No. 92-1700

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GERTRUDE BAUMGART, et al.,

Petitioners,

—v.—

FAIRCHILD AIRCRAFT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether in a state wrongful death action removed to federal court solely as a bankruptcy related matter, the bankruptcy statutes require the district court to either retain jurisdiction or abstain and remand out of comity with the state court, but preclude *forum non conveniens* dismissal?

LIST OF PARTIES TO THE PROCEEDING

The following plaintiffs are parties to this proceeding: Gertrude Baumgart, Iuge Fiss, Marie-Luise Fricke, Regine Grigoleit, Erika Haferkorn, Peter Hellmer, Christiane Hennig, Magret Koeller, Janice Marie Morris, Brigitte Naber, Marie-Luise Remmers, Elsbeth Roske, Dorothie Schmidt, Roger Scholz, Fritz-Brown Scholz, Ursula Schubert, Gisela Sellmann, Karin Sotonyi, Helga Tennhard, and Kate Winter.

The defendant is Fairchild Aircraft Corporation.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (1a)[1] is reported at 981 F.2d 824 (5th Cir. 1993). It affirmed an unreported district court opinion. (22a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

1 References herein to "___a" are to pages in the appendix of this petition.

PROVISIONS OF LAW INVOLVED

28 U.S.C. § 157 Procedures

(b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 1334
Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1452
Removal of claims related to bankruptcy cases

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. . . .

STATEMENT OF THE CASE

In January 1990, the plaintiffs filed nineteen wrongful death actions in the Bexar County, Texas court against the defendant

arising from the 1988 crash of a Fairchild Metroliner aircraft in Germany. Plaintiffs alleged that the crash was caused by the plane's defectively manufactured electrical system. The suits were brought under a Texas statute, Tex. Civ. Prac. & Rem. Code § 71, which provided a state cause of action against a Texas company for the death of a foreign citizen occurring abroad. The defendant was headquartered in Texas and designed, manufactured and sold the subject aircraft there.

Three weeks after suit, defendant filed a bankruptcy proceeding in the federal court below, the Western District of Texas. One week later, the defendant answered the plaintiffs' claims in the Bexar County court, alleging a *forum non conveniens* defense.

In March 1990, the Texas Supreme Court squarely held in a case precisely on point that in actions brought under Tex. Civ. Prac. & Rem. Code § 71, *forum non conveniens* was inapplicable as a matter of law. *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990).

In April 1990, the defendant removed these actions to the Western District of Texas as related to its bankruptcy proceeding.

The plaintiffs promptly moved the federal court to abstain and remand the cases to Texas court. In their motion, all plaintiffs agreed to limit their claims to defendant's insurance coverage.

The district court, adopting a report and recommendation of the bankruptcy court judge, denied plaintiffs' motion and held that under 28 U.S.C. § 157(b)(5), "the wrongful death claims shall be tried in the district in which the bankruptcy case is pending."

With plaintiffs' consent, the bankruptcy court promptly confirmed defendant's reorganization plan and limited plaintiffs' recovery to the liability insurance coverage.

The defendant then moved the district court to decline bankruptcy jurisdiction and grant *forum non conveniens* dismissal. Plaintiffs opposed, claiming the district court had only two alternatives under the bankruptcy statutes: either exercise its bankruptcy jurisdiction under 28 U.S.C. § 157(b)(5) and try the cases, or abstain and remand the cases to state court under 28 U.S.C. §§ 1334(c)(1) and 1452(b).[2] Plaintiffs also renewed their motion to abstain and remand, arguing that following adoption of the reorganization plan, bankruptcy jurisdiction was no longer needed.

On September 30, 1991, a new district court judge was assigned to the case and granted the defendant's dismissal motion that day. (22a). The court agreed that there was no longer any need for bankruptcy jurisdiction over these cases. (23a-24a). But rather than abstain in deference to the state court, the court dismissed under the *forum non conveniens* doctrine. The decision did not address plaintiffs' motion to abstain and remand to Texas state court, or their arguments that dismissal was barred by the bankruptcy law, principles of federal-state comity and the *Alfaro* decision of the Texas Supreme Court.

The United States Court of Appeals for the Fifth Circuit affirmed on January 22, 1993 and held that 28 U.S.C. § 157(b)(5) did not preclude *forum non conveniens* dismissal. *Baumgart v. Fairchild Aircraft Corporation*, 981 F.2d 824 (5th Cir. 1993); (1a). The decision did not address plaintiffs' claim that abstention and remand to the Texas state court was the sole option to trial in the district court. *Id.* at 834-35; (16a).

Plaintiffs petition this Court for a writ of certiorari.

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2 Plaintiffs also claimed that Texas was not an inconvenient forum to the defendant, because it defectively designed, manufactured and sold the aircraft in Texas; post-crash testing was conducted by the defendant at its San Antonio headquarters; numerous witnesses and documents were located in Texas; the United States F.A.A. Ft. Worth office investigated the disaster and issued a key Airworthiness Directive to prevent a similar electrical failure; and the lead German government investigator agreed to appear at trial in Texas.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND THE FEDERAL-STATE CONFLICT CREATED WHEN THE DISTRICT COURT BELOW DECLINED JURISDICTION AND GRANTED A DISMISSAL BARRED IN STATE COURT UNDER A RULING OF THE HIGHEST TEXAS COURT RATHER THAN ABSTAIN AND REMAND UNDER THE COMITY PRINCIPLES EMBODIED IN THE BANKRUPTCY STATUTES.

Certiorari should be granted because the decision below is the first to conflict with the abstention and trial venue provisions of the bankruptcy law, and conflicts with the Second, Fourth and Sixth Circuits. Certiorari is also needed to settle a federal-state conflict created when the decision below allowed defendant to use its bankruptcy to remove state court actions and obtain *forum non conveniens* dismissal contrary to a Texas statute and ruling on point of the Texas Supreme Court. The decision below offends principles of federalism and comity with state courts incorporated in the bankruptcy law. The decision sanctions the unwarranted intrusion of federal courts into state court practice under the guise of bankruptcy jurisdiction.

Bankruptcy law establishes a unique jurisdictional scheme which reconciles the need for unitary federal authority over competing claims to a debtor's limited estate with comity for the state courts and state causes of action. The federal district court has exclusive jurisdiction over the debtor's bankruptcy petition. 28 U.S.C. 1334(a). The state and federal courts share concurrent jurisdiction in civil actions brought against the debtor, including wrongful death and personal injury cases, which are termed "bankruptcy related cases". 28 U.S.C. 1334(b); *see In re Brady, Texas Municipal Gas Corp.*, 936 F.2d 212, 218 (5th Cir. 1991) ("In . . . matters arising in or related

to title 11 cases, unless the Code provides otherwise, state courts have concurrent jurisdiction. . .").

When a debtor removes state court death and injury actions based on its bankruptcy proceeding, the Code provides that the district court where the bankruptcy is pending has two choices. The court may either: (1) retain federal jurisdiction, in which case 28 U.S.C. § 157(b)(5) mandates that the district court where the bankruptcy is pending "shall order" that the claims "shall be tried" either in its own district or in the federal court where the action arose; or (2) decline bankruptcy jurisdiction by statutory abstention under 28 U.S.C. § 1334(c)(1) "in the interest of justice, or in the interest of comity with State courts or respect for State law. . ." and remand the cases to the state court under 28 U.S.C. § 1452(b).

The decision below conflicts with the Second, Fourth and Sixth Circuits which ruled that, absent § 1334(c)(1) abstention in deference to the state court, § 157(b)(5) mandates trial of bankruptcy related actions in one of two specified federal district courts.

The Second Circuit held that "section 157(b)(5) has consistently been construed to recognize discretion in district courts to leave personal injury cases where they are pending. . . . and . . . 'where abstention does not occur'. . . the requirement for adjudication in a district court take[s] effect". *In re Pan American Corp.*, 950 F.2d 839, 844 (2d Cir. 1991), *quoting*, *In re White Motor Credit*, 761 F.2d 270, 273 (6th Cir. 1985).

The Fourth Circuit ruled that 157(b)(5) "was drafted to cover . . . a special group of cases, to wit, personal injury tort claims . . . and in that connection the section is supreme." *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1011 (4th Cir. 1986). *Piccinin* held that where abstention is not granted, § 157(b)(5) overrides 28 U.S.C. § 1412, the bankruptcy *forum non conveniens* statute, which permits transfer to other district courts. *Id.* at 1010-11.

The Sixth Circuit held:

> only "where abstention does not occur" will the requirement for adjudication in a district court take effect. . . . [T]he conferees contemplated that in liquidating tort cases in bankruptcy, *the district court would first decide whether it should leave the cases* with respect to which claims have been filed in the bankruptcy court *in the courts in which they are pending and then, if it decides against this course, the district court must try the cases itself or send them to the federal court for the district in which they arose.*

In re White Motor Credit, 761 F.2d 270, 273 (6th Cir. 1985) (emphasis added), *citing* 130 Cong. Rec. S8889 (June 29, 1984) (Sen. Dole).

Section 157(b)(5) was drafted to permit the district court to consolidate and resolve all state court tort claims against a debtor's estate in a single federal forum. *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir. 1987) (§ 157(b)(5) made "it possible to the extent constitutionally permissible to hear matters relating to a single bankruptcy in a single forum."); *A.H. Robins v. Piccinin*, *supra*, 788 F.2d at 1011, *quoting* 130 Cong. Rec. H7492 (June 24, 1984) (Rep. Kastenmeier) ("[t]he purpose of [157(b)(5)] . . . was, as Congressman Kastenmeier declared, to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case' ").

A single federal bankruptcy forum, however, was not needed for all tort cases and Congress desired to protect the states' interests in having state courts handle private disputes. Abstention was incorporated to allow state court cases which do not adversely impact the bankruptcy proceedings to continue without federal court interference. According to the 1977 House of Representatives report on the original bankruptcy abstention statute,[3] abstention was provided "to insure that the jurisdiction

3 § 1334(c)(1) "is substantially the same as former section 1471(d) of title 28 . . . . [and] the legislative history of former section 1471(d)

of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases. . . ." H.R. Rep. No. 595, 95th Cong., 1st Sess. 51 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6012.

In 1984, Congress redrafted the Code in response to this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). A provision requiring mandatory abstention of all state tort claims was considered because of concerns that bankruptcy jurisdiction over state tort actions was improvident or unconstitutional. Mandatory abstention, however, was rejected as "too broad, in that it prohibited the bankruptcy courts or district courts from considering any case that was based upon a State law claim." 130 Cong. Rec. S8890 (June 29, 1984) (Sen. Dole).[4] Senator Dole observed that § 157(b)(5) and 1334(c)(1) represented a "compromise" which gave the district court the choice of federal court trial or permissive abstention in deference to the state court:

> The Senate conferees reached a fair compromise on this issue. The result of the Conference discussion was a provision that preserves the integrity of bankruptcy jurisdiction while allowing abstention for personal injury cases where they can be timely adjudicated in State courts. In addition, where abstention does not occur, those cases will be handled by the district court where the bankruptcy has been filed or, if that court finds it appropriate, where the claim arose.

Ibid.

The Congressional history of the Code's abstention provision is replete with references to the importance of federalism and

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remains an important reference when construing its successor." *In re Pan American Corp.*, 950 F.2d 839, 845 (2d Cir. 1991).

4 28 U.S.C. § 157(b)(4) provides that "[n]on-core proceedings under section 157(b)(2)(B) [*i.e.*, personal injury and death claims] . . . shall not be subject to the mandatory abstention provisions of section 1334(c)(2)."

federal-state comity. That history also demonstrates that abstention was provided to allow district courts to defer to state courts to decide state claims when a unitary bankruptcy forum was not needed; to promote timely adjudication of state claims; and to avoid burdening the federal courts with state tort claims only tangentially related to a bankruptcy.[5]

Abstention and remand were appropriate herein because plaintiffs' claims were limited to Fairchild's insurance coverage and thus did not impact other creditors' claims to debtor's estate. *See Foust v. Munson Steamship Lines*, 299 U.S. 77, 79-80 (1936) (reversed lower courts' refusal to lift bankruptcy stay of death claim where "debtor is covered by liability insurance . . . the stay is unjust to the surviving father, gives no advantage to the debtor and benefits only the insurer."). There was no bankruptcy interest which required that federal jurisdiction over these state claims be maintained. If a bankruptcy interest required federal jurisdiction, a district court trial was mandated.

The decisions below violate the federal-state comity principles embodied in the bankruptcy law. Texas clearly asserted

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5 In discussing abstention, Senator Dole stated that "comity between Federal and State courts depends upon the mutual respect that each of those divisions of the national judiciary has for the jurisdiction of the other." 130 Cong. Rec. S7157 (June 19, 1984) (Sen. Dole), *quoted in, In re Pan American Corp.*, 950 F.2d 839, 846 (2d Cir. 1991). Senator Heflin spoke in favor of abstention, explaining that "I certainly am for continuing our great system of federalism in this country and not for the creation of an all powerful Federal bankruptcy system." 130 Cong. Rec. S7619 (June 19, 1984) (Sen. Heflin). Senator Hatch urged "respect for State court processes", observed that "federalism and respect for State court processes are important values even if there is some slight cost in terms of efficiency . . ." and that the "full exercise" of bankruptcy jurisdiction "may congest bankruptcy courts with state law issues tangentially related to a bankruptcy." 130 Cong. Rec. S6089, S7623 (May 21, 1984, June 19, 1984) (Sen. Hatch). Senator DeConcini observed that "timely State court adjudication . . . will not normally threaten the administration of the bankruptcy case." 130 Cong. Rec. S7620 (June 19, 1984) (Sen. DeConcini).

its state interest in giving foreign citizens a Texas forum to bring death and injury claims against Texas defendants. In *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), the Texas Supreme Court declared that the *forum non conveniens* doctrine was statutorily abolished in cases governed by Tex. Civ. Prac. Rem. Code § 71, which provided a cause of action for foreign citizens injured abroad by Texas defendants.[6] The Texas Supreme Court found that the rejection of *forum non conveniens* was a longstanding policy first adopted by the Texas legislature in 1913. *Alfaro*, *supra*, 786 S.W.2d at 677-78.

Fairchild used its bankruptcy filing to remove these cases to federal court three weeks after the *Alfaro* decision for the admitted purpose of seeking *forum non conveniens* dismissal not available in state court. Rather than curb the effect of bankruptcy jurisdiction on state actions, as Congress intended, the decisions below seriously undermine federalism and the integrity of the Texas state court system by approving the defendant's use of bankruptcy jurisdiction to circumvent a Texas statute and a Texas Supreme Court opinion.

In *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987), this Court applied non-statutory abstention in a federal civil rights action brought to enjoin application of Texas judgment execution procedures in a Texas state court case. *Pennzoil* observed that "[t]his Court repeatedly has recognized that the States have important interests in administering certain aspects of their judicial systems." *Id.* at 12-13. The Court granted abstention to uphold the Texas state court procedure based on

> the notion of 'comity,' that is a proper respect for state functions, a recognition of the fact that the entire country

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6 Section 71.031 of the Texas Civil Practice and Remedies Code provides in part:

> An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect or default causing the death or injury takes place in a foreign state or country.
>
> . . .

> is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . [T]he concept . . . represent[s] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 10, *quoting Younger v. Harris*, 401 U.S. 37, 44 (1971).

Congress expressly intended to protect these same state interests in bankruptcy-related cases by adopting statutory abstention and remand. This Court has observed that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971).

The decisions below failed to consider the substantial Texas state interests implicated herein. By dismissing the cases rather than abstaining after conceding that federal bankruptcy jurisdiction was no longer needed, "[b]oth the District Court and the Court of Appeals failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system." *Pennzoil Co. v. Texaco, supra*, 481 U.S. at 14.

The application of the *forum non conveniens* doctrine below was not only unprecedented but illogical, because federal jurisdiction was based on an action voluntarily filed by the defendant in the Western District of Texas. Equity bars a defendant who creates federal jurisdiction by filing a bankruptcy petition from asking the court to decline that jurisdiction to dismiss plaintiffs' removed state court actions. Indeed, to petitioners' knowledge, no court has ever granted *forum non conveniens*

dismissal to the party that filed the action which established federal jurisdiction.

Moreover, this Court has ruled that bankruptcy law should be applied "to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.' " *Butner v. United States*, 440 U.S. 48, 55 (1979).

This Court has also recognized that *forum non conveniens* "is not a principle of universal applicability." *United States v. National City Lines, Inc.*, 334 U.S. 573, 596-97 (1948). In *National City Lines*, the Court held that the purpose of federal antitrust statutes would be defeated "by application of the discretionary power comprehended by *forum non conveniens*." *Id.* at 586. Likewise, the purpose of exercising bankruptcy jurisdiction over state tort claims was defeated by the dismissal below.

The Fifth Circuit overlooked the unique nature of bankruptcy jurisdiction over state tort claims. Unlike other forms of general federal jurisdiction, bankruptcy jurisdiction is exercised for a limited purpose based on the status of the defendant-debtor. A unitary federal bankruptcy forum is available if needed. But once the district court handling the bankruptcy concludes that the claim will have no impact on the defendant as a debtor in bankruptcy, bankruptcy jurisdiction is unwarranted. In such cases, Congress has provided abstention and remand in deference to the state court. This unique Congressional scheme of broad federal bankruptcy jurisdiction tempered with abstention and remand in cases that will not significantly impact the bankruptcy ensures protection of debtors and creditors while preserving the important principles of federalism and comity. Those principles were violated here.

CONCLUSION

Certiorari should be granted to review the decision below.

Dated: April 22, 1993

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5784

Jan. 22, 1993

Gertrude BAUMGART, et al.,
Plaintiffs-Appellants,

—v.—

FAIRCHILD AIRCRAFT CORPORATION and
Swearingen Aviation Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before:

REYNALDO G. GARZA, GARWOOD, *Circuit Judges*, and
WERLEIN*, *District Judge*.

WERLEIN, *District Judge*:

These consolidated cases arise from the crash near Kettwig, Germany of a Fairchild Metroliner III Aircraft owned and operated by Nurenburger Flugdienst ("NFD"), a German airline. Plaintiffs are nineteen German citizens who originally sought recompense for their injuries in the Texas state courts. Defendant Fairchild Aircraft Corporation ("Fairchild"), after filing a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Western District of Texas, removed

* District Judge of the Southern District of Texas, sitting by designation.

all nineteen cases to federal court. Fairchild then moved the court to dismiss the cases under the doctrine of *forum non conveniens*, arguing that Germany is the proper forum for the resolution of Plaintiffs' claims. Fairchild's motion was granted, and Plaintiffs appealed.

The major issue on appeal is whether the Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 157(b)(5), prohibits the district court from dismissing under the doctrine of *forum non conveniens* a bankruptcy-related wrongful death case that arose in a foreign country. We hold that the Act does not prohibit a *forum non conveniens* dismissal.

I. FACTS

On February 8, 1988, a Fairchild Metroliner III Aircraft, owned by the German airline NFD and operated as NFD Flight 108, was making a regularly scheduled flight from Hanover Airport in Hanover, Germany to Lohausen Airport in Dusseldorf, Germany. Approximately seven nautical miles away from landing, the aircraft was struck by lightning, lost electrical power, entered an uncontrolled descent, and flew in and out of the clouds for several minutes before finally crashing near Kettwig, Germany. The two pilots and all nineteen passengers perished.

Personal representatives of the deceased passengers, all of them citizens and residents of Germany, filed nineteen separate lawsuits against Fairchild[1] in sixteen different state district courts of Bexar County, Texas, alleging causes of action based on strict liability, breach of warranty, and negligence. Plaintiffs sought damages for wrongful death and survival, pre-judgment interest, and exemplary damages under Texas state law.

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1 Appellants also sued Swearingen Aviation Corporation ("Swearingen"), the predecessor in interest to Fairchild. Although Swearingen is named as a defendant in this action, the parties have advised the Court that Swearingen no longer exists as a corporate entity.

Fairchild, for reasons unrelated to the personal injury suits,[2] filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Western District of Texas. Fairchild subsequently removed all nineteen state court actions to the bankruptcy court, alleging that the actions related to its bankruptcy proceeding as contemplated by 28 U.S.C. § 1334(b).

Plaintiffs, in turn, moved for discretionary abstention under 28 U.S.C. § 1334(c)(1) or, alternatively, for remand of the nineteen cases to state court pursuant to 28 U.S.C. § 1452(b). The Honorable Emilio M. Garza, then United States District Judge, after conducting a *de novo* review of the Bankruptcy Judge's recommendation that Plaintiffs' motion be denied, adopted the recommendation in its entirety. The Court consolidated all nineteen actions in the district court and issued an Order lifting the automatic stay imposed by 11 U.S.C. § 362.

Fairchild then moved to dismiss the consolidated cases on the grounds of *forum non conveniens*, alleging that Plaintiffs' home country of Germany where the airline crash occurred is the proper forum for the resolution of Plaintiffs' claims. Plaintiffs replied that 28 U.S.C. § 157(b)(5) deprived the district court of any discretion to dismiss bankruptcy-related wrongful death action pursuant to the doctrine of *forum non conveniens*. The Honorable Edward C. Prado, United States District Judge, dismissed the consolidated cases and ordered Plaintiffs to file suit in Germany within 120 days.[3] It is from this ruling granting Fairchild's Motion to Dismiss that Plaintiffs now appeal.

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2 Fairchild cites "infighting among Fairchild's competing shareholder groups [leading] to severe lapses in management, followed by layoffs, and eventual pressure from the company's principal lender, Sanwa Business Credit," as the reason for Fairchild's Chapter 11 filing.

3 By Order dated September 30, 1991, Judge Prado granted Plaintiffs' request that the 120-day time limit for filing the actions in Germany be stayed pending the outcome of this appeal.

II. DISCUSSION

A court's authority to effect foreign transfers through the doctrine of *forum non conveniens* "derives from the court's inherent power, under Article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice, or oppression." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1155 (5th Cir.1987), *aff'd in part, vacated in part*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (1989), *vacated sub nom. Pan Am World Airways, Inc. v. Lopez*, 883 F.2d 17 (5th Cir.1989), *citing Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 530, 67 S.Ct. 828, 835, 91 L.Ed. 1067 (1947). Through this power a federal trial court may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum. *Id., citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S.Ct. 252, 263, 70 L.Ed.2d 419 (1981); *Koster*, 330 U.S. at 530, 67 S.Ct. at 835; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S.Ct. 839, 842, 91 L.Ed. 1055 (1947).

The court's interest in controlling a crowded docket also provides a basis for the court's inherent power to dismiss on grounds of *forum non conveniens*: "the 'chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems' " *Id., citing Reyno*, 454 U.S. at 241, 102 S.Ct. at 258 (*quoting Koster*, 330 U.S. at 524, 67 S.Ct. at 831). "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Id., citing Gulf Oil Corp.*, 330 U.S. at 590-91, 67 S.Ct. at 921. Although the doctrine "arose in the areas of admiralty and equity," this Court has observed that the doctrine "is now applied in a wide spectrum of cases in both federal and state courts." *Id., citing Syndicate 420 at Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 825 (5th Cir.1986)

(maritime insurance contracts case); *Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 359-60 (6th Cir.1985) (strict liability pharmaceuticals case).

After examining the cases spawned by the crash in Germany of NFD Flight 108, the district court determined that the convenience of the parties and the court and the interests of justice would be better served if the wrongful death actions were tried in Germany. While Appellants also take issue with the district court's findings as a substantive matter, Appellants' primary focus is their legal argument that the doctrine of *forum non conveniens* is not available to district courts in bankruptcy-related wrongful death actions. Appellants contend that the statutory language and legislative purpose of 28 U.S.C. § 157(b)(5) are inconsistent with and thus preclude a *forum non conveniens* dismissal. The question appears to be one of first impression.

A. *Effect of § 157(b)(5) on the Doctrine of Forum Non Conveniens*

Title 28 U.S.C. § 157(b)(5) provides that

> [t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy is pending.

28 U.S.C. § 157(b)(5) (West 1991). Appellants insist that the plain meaning and legislative history of the words, "[w]rongful death claims shall be tried in the district court . . . . ," render the doctrine of *forum non conveniens* inapplicable to bankruptcy-related wrongful death cases. Thus, argue Appellants, the district court is *required* to try these cases even if the convenience of the parties and the ends of justice would be better served by hearing the cases in a foreign forum in which the claims arose.

Although Appellants are correct in stating that the United States Supreme Court and this Court have held that the doctrine

of *forum non conveniens* is inapplicable when the language and legislative purpose of a statute are inconsistent with *forum non conveniens* dismissal, the cases cited by Appellants for application of this proposition are quite different from the case at bar. *United States v. National City Lines, Inc.*, 334 U.S. 573, 596, 68 S.Ct. 1169, 1181, 92 L.Ed. 1584 (1948) (*"National City Lines I"*), held that a district court could not employ the doctrine of *forum non conveniens* to accomplish a domestic transfer of venue in an antitrust suit.[4] The *National City Lines* cases, as well as the third case cited by Appellants, *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir.1982), *vacated on other grounds*, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983) (a case also involving violations of the Sherman Act),[5] apply only in the limited context of antitrust actions. As explained in *Kempe*, there is a "crucial point" of difference between antitrust suits and other types of cases:

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4 *National City Lines I* was decided before Congress enacted 28 U.S.C. § 1404(a), which specifically authorized the district court, "[f]or the convenience of parties and witnesses, and in the interest if justice," to transfer civil actions "to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (West 1991). As noted by this Court in *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138 (5th Cir.), *cert. denied*, 493 U.S. 918, 110 S.Ct. 279, 107 L.Ed.2d 259 (1989):

> [i]n light of the new congressional mandate regarding transfers [§ 1404(a)], the Supreme Court allowed the [*National City Lines I*] case to be transferred to another court on later petition. *United States Nat'l City Lines, Inc.*, 337 U.S. 78 [69 S.Ct. 955, L.Ed. 1226] (1949) (*National City Lines II*). In that later case, the Court did not indicate what result it would reach in a case where application of the *forum non conveniens* doctrine would lead to dismissal of a Sherman Act case in favor of a foreign forum. Such a situation is not covered by section 1404, which preserves the action, albeit in a different federal venue.

Id. at 1144.

5 The statute at issue in both *National City Lines* and *Mitsui* is 15 U.S.C. § 22, which provides: "any suit . . . under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business."

> [A]ntitrust cases are unlike litigation involving contracts, *torts*, or other matters recognized in some form in every nation. A plaintiff who seeks relief by means of one of these types of actions may appropriately be sent to the courts of another nation where presumably he will be granted, at least approximately, what he is due. But the antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated. To relegate a plaintiff to the courts of a nation which does not recognize these antitrust principles would be to defeat this congressional direction by means of a wholly inappropriate procedural device.

Kempe, 876 F.2d at 1142-1143, *quoting Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811, 818 (D.D.C.1983) [emphasis added]. These same concerns were present in *Mitsui*, in which the court determined that Indonesia, the country to which transfer was sought, would refuse to entertain the plaintiffs' Sherman Act claims. *See Mitsui*, 671 F.2d at 891 ("A dismissal for *forum non conveniens*, then, would be the functional equivalent of a decision that defendants' acts are beyond the reach of the Sherman Act.")[6]

Unlike the facts in those cases, the district court here found "that German law recognizes products liability and wrongful death actions under Section 823 and 844 of the German civil code." In addition, the record supports the conclusion that all parties—plaintiffs, Fairchild, and also the potential third parties—are within the jurisdiction of the German courts. Based upon these findings, the district court concluded that "an adequate and available foreign forum exists" for the resolution of Appellants' claims in Germany. We agree that this case does not involve issues peculiar to American jurisprudence, and we conclude that the results reached in *National City Lines* and *Mitsui* are therefore not controlling precedents in this case.

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6 The court also noted that the antitrust statutes are penal in nature, and that principles of international law preclude one country's courts from executing the penal laws of another. *Mitsui*, 671 F.2d at 891.

National City Lines I does lay before us, however, the *approach* required to be taken in judging whether Congress, by its enactment of a statute vesting jurisdiction in the courts and prescribing venue, has thereby deprived the courts of discretionary power to defeat the plaintiff's choice of venue and has thus rendered the doctrine of *forum non conveniens* to be of no effect. The Court wrote:

> [The question] is one not to be answered by such indecisive inquiries as whether the venue or jurisdictional statute is labeled a "special" or a "general" one. Nor is it to be determined merely by the court's view that applicability of the doctrine would serve the ends of justice in the particular case. *It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection.*

334 U.S. at 597, 68 S.Ct. at 1182 (emphasis added). We therefore examine the legislative purpose of the Act, the language used, and whether the legislation is intended to vest power of choice in the plaintiff or, instead, confers power on the courts to qualify the plaintiff's choice of forum.

Title 28 U.S.C. § 157(b)(5) is part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the Act"), which statute "[e]stablished a new system of jurisdiction, *necessitated* by the Supreme Court's ruling in *Northern Pipeline Constru. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). . . ." 130 Cong.Rec. H 6087-6088 (June 20, 1984) (floor statements) [emphasis added]. In *Marathon*, the United States Supreme Court had held that a previous grant to bankruptcy courts of sweeping jurisdiction was unconstitutional because it vested Article III power in judges who do not enjoy the protections and safeguards specified in that article. *Id.* at 62, 102 S.Ct. at 2867. Faced with the possibility that all matters previously delegated to bankruptcy courts would again be borne by the already over-

burdened Article III courts, Congress enacted § 157(b)(5) "to conform the bankruptcy statute to the dictates of *Marathon*" by excluding from bankruptcy court jurisdiction subject matter that is not specifically derived from the bankruptcy laws. *Matter of Wood*, 825 F.2d 90, 95 (5th Cir.1987).[7] This intent is manifested throughout the statute's legislative history. *See* 130 Cong.Rec. S 8891 (June 29, 1984) (remarks of Sen. Hatch), *reprinted in* 1984 U.S.C.C.A.N. at 590 ("Title I [which includes § 157(b)(5)] corrects the constitutional flaw discerned by the Supreme Court in the *Marathon* case which prohibited bankruptcy judges, who lack life tenure, from deciding certain bankruptcy cases grounded in State law."); 130 Cong.Rec. H 7489 (June 29, 1984) (remarks of Cong. Rodino), *reprinted in* 1984 U.S.C.C.A.N. at 576 ("Title I creates a new bankruptcy court arrangement to replace the provisions enacted in the Bankruptcy Reform Act of 1978—Public Law 95-598—which were found unconstitutional by the U.S. Supreme Court in [*Marathon*].") By placing in the district courts jurisdiction over certain types of cases, specifically personal injury and wrongful death actions, Congress responded directly to the constitutional infirmities identified by the Court in *Marathon* while preserving the Article I administrative court system that it had created to deal with bankruptcy-related matters.

Appellants argue that Congress's purpose was to consolidate all bankruptcy related matters and that Section 157(b)(5) was added as a special venue provision to advance the concept of a "single forum" for all bankruptcy-related matters. This "single forum" argument is undercut, however, by the explicit language of § 157(b)(5), which itself specifies a choice of forums in which a bankruptcy-related wrongful death action may be heard: in the district court for the district in which the bankruptcy is pending *or in the district in which the claim arose*. The passages quoted by Appellants in support of their

7 Section 157(b)(5) was drafted to limit the bankruptcy court's authority to so-called "core proceedings," a term coined in *Marathon* to refer to "the restructuring of debtor-creditor relations." *Marathon*, 458 U.S. at 71, 102 S.Ct. at 2871. Personal injury and wrongful death actions are "non-core" proceedings and thus cannot be heard by a bankruptcy court. *See* 130 Cong.Rec. H 7492 (June 29, 1984) (floor statements of Rep. Kastenmeier).

position actually militate against their "single forum" argument. The language provides that consolidation of actions in the forum where the bankruptcy is pending is *permissible*, but *not mandatory*. As stated by the First Circuit: "The new structure would make it *possible* to the extent constitutionally permissible to hear matters relating to a single forum." *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir.1987) [emphasis added].[8]

Congress's express conference of power on the district court in which the bankruptcy is pending to fix venue in the jurisdiction in which a plaintiff's cause of action arises, plainly indicated Congress's recognition (1) that the jurisdiction, as the site of the wrongful death, may have an actual interest in litigating the matter, and (2) that the most eyewitnesses to the incident and at least some evidence may be located there. In light of such a provision, we cannot fairly impute to Congress an intention implicitly to remove from the courts their inherent power also *to effect the transfer of an appropriate wrongful death claim to a foreign forum where the cause of action arose.*

The principal cases relied upon by Appellants involve application of § 157(b)(5) to domestic litigation, which § 157(b)(5) specifically addresses. Thus, for example, in *A.H. Robbins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.1986), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986), the district court in which was pending the Chapter 11 bankruptcy of the manufacturer of the Dalkon Shield, entered a tentative order that all actions against the debtor based upon personal injury tort or wrongful death claims arising from use of the Dalkon Shield would be tried in that district court. The principal issue was

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8 Appellants also argue that the bankruptcy court could maintain some supervision over the bankruptcy-related claims even while they are being litigated in another federal court, but not if the dismissal were to a foreign country. The argument is not persuasive. First, there is no sign that Congress intended for a district court in which the bankruptcy is filed to supervise the adjudication of a wrongful death action that it permits or directs to be tried in another district. And second, in this day of instant worldwide communications, the progress of a wrongful death case pending in Germany can be followed by the district court where the bankruptcy is pending virtually as easily as following the progress of a case in an adjacent judicial district.

whether transfer of the cases from other districts (5000 cases were pending) could be ordered by the receiving district court in which the bankruptcy was pending, or whether transfers, if made at all, would need to be ordered by the various district courts where the cases were pending, pursuant to the general bankruptcy venue statute allowing transfers in the interest of justice or for the convenience of the parties. *See* 28 U.S.C. § 1412. The Fourth Circuit had "no difficulty" in finding that the district court in which the bankruptcy was pending had authority under § 157(b)(5) to fix venue of personal injury tort actions against the debtor regardless of the district in which the controversy was pending. In reconciling § 1412 with § 157(b)(5) the Court wrote that as to a special group of cases, "to wit, personal injury tort claims against a debtor in Chapter 11 proceedings wherever pending," § 157(b)(5) is "supreme" in the sense of *denying* to the same district court the power to dismiss a case under the doctrine of *forum non conveniens* in order to effect an international transfer to a forum where the action arose. This argument is flawed, first, because § 157(b)(5) clearly confers *enlarged* powers upon the bankruptcy district court to fix venue, with no apparent intent to diminish venue powers already held by the court; and second, because the Fourth Circuit was engaged *only* in reconciling §§ 1412 and 157(b)(5), and found that between the two sections the latter was "supreme" in that limited context; the court never had before it a question of whether enactment of § 157(b)(5) served *sub silentio* to rescind the doctrine of *forum non conveniens*.

In *In re White Motor Credit*, 761 F.2d 270 (6th Cir.1985), also relied on by Appellants, the district court in which the bankruptcy was pending ordered that 160 separate, unliquidated and contingent products liability cases against the debtor, pending in various state and federal courts, would be left for adjudication in those courts. On appeal the debtor, similar to Appellants here, argued that § 157(b)(5) *curtailed* the district court's discretion over venue. The debtor argued that the new statute prevented the district court from abstaining as it had done and instead compelled the court to order trials either

before it or in the federal district courts where the claims arose. The Sixth Circuit wrote,

> [w]hen read in isolation, section 157(b)(5) seems to support the debtor's contention that the tort claims may not be liquidated in other courts, as the District Court has ordered; but a reading of the entire law in light of its purpose and history leads to the opposite conclusion.

761 F.2d at 271. The court went on to construe § 157(b)(5) in harmony with § 1334(c)(1), which allows discretionary abstention, and held that the district court had "authority to leave tort cases in the courts [including state courts] in which they are pending for liquidation there." 761 F.2d at 273. Thus, in *White Motor Credit* § 157(b)(5) once again was construed to *enlarge* the district court's power to fix venue over personal injury tort cases related to the bankruptcy pending in such court.

Other provisions of Title 28 demonstrate Congress's intent *not to require the district courts to entertain all bankruptcy-related cases over which they have jurisdiction*. 28 U.S.C. § 1334(b) provides that the district court's jurisdiction of such matters is "original but *not exclusive*." Moreover, 28 U.S.C. §1334(c)(1) provides: "[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or relating to a case under title 11." Courts interpreting § 1334(c) have held that the provision "summarizes and incorporates federal non-bankruptcy abstention doctrines." *In re Pan American Corp.*, 950 F.2d 839 (2d Cir.1991), *quoting General American Communications Corp. v. Landsell*, 130 B.R. 136, 146 (S.D.N.Y.1991). Again, it does not follow that Congress would expressly allow the federal district courts to defer by abstention to state courts "in the interest of justice," but would at the same time implicitly divest them of their inherent power to abstain when the interest of justice would be served by a case being heard in a foreign tribunal where the action arose.

An examination of Section 157 in its entirety is also instructive. The several subsections variously provide for referrals of

cases to the bankruptcy judges; allow bankruptcy judges to hear and determine all cases under Title 11 and all core proceedings arising under Title 11; list numerous examples of core proceedings; require the bankruptcy judge to determine if a proceeding is a core proceeding; exempt non-core proceedings from the mandatory abstention provisions of § 1334(c)(2); outline conditions under which a bankruptcy judge may hear a non-core proceeding related to a case under Title 11 and make recommendations to the District Judge; authorize the district court to withdraw any case or proceeding referred to the bankruptcy judge; and similar matters. Embedded in this procedural section is subsection (b)(5), at issue in this case. Read in the context of Section 157, where it appears, and in the context of the history giving rise to the Act and its remedial purpose, the language of § 157(b)(5) delineates jurisdiction *only as between the bankruptcy courts and the district courts*. In other words, non-core proceedings such as personal injury tort and wrongful death claims shall not be adjudicated in bankruptcy court, but in the Article III district court. Moreover, the district court in which the bankruptcy is pending shall have *added* power to order tried in its own venue personal injury tort and wrongful death claims filed elsewhere, or to order such cases tried in the districts where the claims arose. Once a personal injury tort or wrongful death claim is lodged in the district court where the bankruptcy is pending, however, neither the Act itself nor the legislative history of the Act evidences any intent on the part of Congress to abrogate the long-standing doctrine of *forum non conveniens* in the context of foreign transfers. Indeed, there is no reference to the doctrine of *forum non conveniens* anywhere in the statute's legislative history.[9]

This court was confronted with a similar issue in *In re Air Crash Disaster*. Plaintiff argued that certain language in the Warsaw Convention implicitly prevented a district court from considering and applying the doctrine of *forum non conveniens*. The argument was rejected:

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9 Likewise, a leading bankruptcy treatise's discussion of § 157(b)(5) does not even mention *forum non conveniens*, much less its "implied" repeal. *See* 1 *Collier on Bankruptcy* § 3.01 pp. 3, 82, 86 (15th Ed.1990).

> The party initiating the action enjoys the prerogative of choosing between [several] possible [national] forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum's internal laws. . . . No evidence can be found anywhere that the drafters of the [Warsaw] Convention intended to alter the judicial system of any country. We simply do not believe that the United States through adherence to the Convention has meant to forfeit such a valuable procedural tool as the doctrine of *forum non conveniens*.
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> If we were to adopt the plaintiff's construction . . . , American courts could become the forums for litigation that has little or no relationship with this country. The plaintiff's interpretation . . . cuts against the Convention's underlying purpose of ensuring that a dispute arising out of an air travel accident is litigated in a forum that has an actual interest in the matter.

Id. at 1162 [citations omitted]. Similarly, the First Circuit held that a special venue provision in the United States securities laws does not prevent a district court from effecting foreign transfers under the doctrine of *forum non conveniens*:

> [W]e can find no good policy reason for reading the special venue provisions as if someone in Congress really intended them to remove the courts' legal power to invoke the doctrine of *forum non conveniens* in an otherwise appropriate case. The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal system work together, in harmony, rather than at cross purposes. To insist that American courts hear cases where the balance of convenience and the interest of justice require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one coun-

> try will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy. And, to deprive American courts of their transfer power when, but only when, one of more than three hundred special venue statutes applies, would create a hodgepodge that would, or would not, bring about American adjudication of an essentially foreign controversy, depending upon the pure happenstance that Congress—at some perhaps distant period and likely out of a desire to widen plaintiffs' venue choices in typical domestic cases—enacted a "special venue" provision. *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3804 at 28 n. 2 (citing ALI study listing some 330 venue provisions in section of the United States Code not in Title 28). Such a result would seem thoroughly unsound.

Howe v. Goldcore Investments, Inc., 946 F.2d 944, 950 (1st Cir.1991). *See also Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir.1983) (upholding *forum non conveniens* dismissal of Jones Act claim even though Jones Act provides that jurisdiction "shall be" in the district court.)

From our review of the relevant materials, the legislative purpose, and the effect of the language used to achieve that purpose, we conclude that § 157(b)(5) was intended to confer new power upon the district court in which a bankruptcy is pending to qualify the choice of venue made by a plaintiff."[10] An enactment conferring upon the district court additional power to control venue cannot properly be construed to deprive the courts of their established discretionary powers over venue. Under such circumstances specific legislation would be necessary to abrogate the doctrine of *forum non conveniens*. There is no evidence here of a Congressional intent to do so by enactment of 28 U.S.C. § 157(b)(5), and we cannot construe the language more broadly than appears to have been intended by Congress to achieve the purpose of the Act. Especially in view of Congress's expressed intent that district courts in which the bankruptcy is pending may order nationwide transfers of cases

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10 *United States v. Natl. City Lines*, 334 U.S. at 597, 68 S.Ct. at 1182.

to permit, for example, wrongful death claims to be tried in any district where they may arise, we cannot read into the statute an implied repeal of the doctrine by which the courts have discretion to effect identical transfers to foreign tribunals where wrongful death actions arise. Accordingly, we hold that § 157(b)(5) does not abrogate the doctrine of *forum non conveniens* in the context of foreign transfers and that the district court was not precluded by such statute from dismissing the instant action on *forum non conveniens* grounds.

The second issue raised by Appellants, namely, whether abstention and remand are the district court's only available alternatives to retaining jurisdiction over a bankruptcy-related wrongful death case, is rendered moot by our holding above. We therefore now consider the third issue raised: whether the district court committed a clear abuse of discretion in ordering the *forum non conveniens* dismissal.

Review of the District Court's Forum Non Conveniens Dismissal

A district court's grant or denial of a motion to dismiss on the grounds of *forum non conveniens* may be reversed only where there has been a clear abuse of discretion. *Reyno*, 454 U.S. 235, 255, 102 S.Ct. 252, 266; *In re Air Crash Disaster*, 821 F.2d at 1147. Where the district court "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Reyno*, 454 U.S. at 257, 102 S.Ct. at 266 (upholding district court's dismissal of a products liability suit for reasons of convenience of trial, and requiring transfer of the case from Pennsylvania defendants and the likelihood that Scottish law was less favorable to Plaintiffs).

Appellants first contend that in granting the *forum non conveniens* dismissal the district court abused its discretion by "fail[ing] to consider that Fairchild was estopped from moving to dismiss." (Appellants' Brief at 22). Specifically, Appellants argue that Fairchild's removal of the case from state court in Bexar County to federal court in the Western District of Texas

precluded Fairchild from later moving to dismiss or transfer the case to any other forum. In support of this position, Appellants rely primarily on *Ins. Co. of North America v. Ozean Stinnes-Linien*, 367 F.2d 224, 226-227 (5th Cir.1966), wherein this Court held that a domestic transfer pursuant to 28 U.S.C. § 1404(a) precluded a subsequent motion to dismiss on the grounds of *forum non conveniens*. We find that *Ozean* is inapplicable to this case, as this case does not involve a § 1404(a) motion to transfer. Moreover, the United States Supreme Court has upheld, without any discussion of estoppel, a district court's dismissal under *forum non conveniens* even where the case had previously been removed to federal court and transferred to a different federal forum under § 1404(a). *See Reyno*, 454 U.S. at 235, 102 S.Ct at 252; *See also Nolan v. Boeing Co.* 762 F.Supp. 680 (E.D.La.1989) (*forum non conveniens* dismissal granted after removal to federal court).

Appellant next contends that the district court abused its discretion in its application of the *forum non conveniens* analysis. A *forum non conveniens* analysis involves a three step inquiry. First, the court must determine whether there exists another forum that is available to the litigants and would provide an adequate remedy to the prevailing party. *Reyno*, 454 U.S. at 234 n. 22, 102 S.Ct. 265 n. 22; *In re Air Crash Disaster*, 821 F.2d at 1164. "A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum." *In re Air Crash Disaster*, 821 F.2d at 1165; *Syndicate 420*, 796 F.2d at 830; *Calavo Growers of California v. Belgium*, 632 F.2d 963, 968 (2d Cir.1980). "A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court." *In re Air Crash Disaster*, 821 F.2d at 1165, *citing Reyno*, 454 U.S. at 253, 102 S.Ct. at 265; *Syndicate 420*, 796 F.2d at 829.

The district court determined that the courts of Germany could provide an adequate, available forum for the resolution of plaintiffs' actions. The court found: (1) that German law recognizes products liability and wrongful death actions under Section 823 and 844 of the German civil code, and (2) that all

parties in the case are within the jurisdiction of the German courts. Appellants have not challenged these findings, and we find no abuse of discretion in the trial court's holding.

The second step in the analysis requires a balancing of "private interest" factors. Such factors include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing, witnesses;[11] (3) probability of an opportunity to view the premises, if view would be appropriate to the action; and (4) other factors affecting the ease, speed, and expense of trial or the enforceability of a judgment obtained. *Gulf Oil*, 330 U.S. at 508, 67 S.Ct. at 843; *In re Air Crash Disaster*, 821 F.2d at 1162-1163. While reviewing the private interest factors, the court should also consider whether the defendant's motion to dismiss was filed in a timely manner. *In re Air Crash Disaster*, 821 F.2d at 1165.

In the case at bar, the district court found that several private interest factors favored dismissal, including (1) the existence in Germany of almost all of the physical evidence relating to the accident, including meteorological data, testimony of other pilots and eyewitnesses, cockpit voice recorder tapes and information from the flight data recorder, photographs of the wreckage, air traffic controllers' reports, and the results of tests performed by the German Accident Investigation Board ("GAIB") on the components and wreckage of NFD Flight 108; (2) the fact that NFD's headquarters are in Germany, and thus all evidence about the maintenance of the aircraft, the operational history of the aircraft, and records concerning the hiring and training practices of NFD are in Germany; (3) the fact that all evidence required to calculate damages, such as the decedents' health, life expectancies, educations, and present and future earning capacities, is in Germany, as are all of the wit-

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11 *See De Melo v. Lederle Laboratories Div. of American Cyanamid Corp.*, 801 F.2d 1058, 1063 (8th Cir.1986) ("It is of considerable importance . . . that litigation in the United States would deprive Lederle of compulsory process. . . .") *See also Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir.1978) ("inability to bring [witnesses] here for live cross-examination before a fact-finder" is "[p]erhaps the most significant problem" making adjudication in a United States court inappropriate).

nesses with knowledge relating to those matters; (4) the fact that the witnesses in Germany are beyond the reach of the district court's compulsory process, thus requiring the parties, if jurisdiction over the case were retained, to face the cost of deposing foreign witnesses and the prospect of not having live witnesses at trial; (5) the inability of Fairchild to implead NFD and the co-pilot's estate as third-party defendants if the case were retained in the United States; and (6) language problems that would arise if the case were tried in the United States, including the need to translate into English all documents and investigation reports created in Germany. On the other hand, the district court found some factors in favor of retaining jurisdiction, including (1) respect for the plaintiffs' choice of forum;[12] and (2) potential difficulties regarding enforcement of any judgment that might be rendered by a German court.[13] (District Court Opinion at 8-12).

Appellants contend that the district court failed to give sufficient weight to the fact that certain of their evidence is located in Texas. Additionally, Appellants stress that GAIB Chief Inspector Schlegel agreed to testify in Texas and that the GAIB investigation report, which would contain much of the meteorological and air traffic data, would be admissable in the United States courts. We find, however, that the district court did give attention to such considerations. In fact, after outlining the many factors favoring transfer of this case to Germany the trial court wrote:

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12 Although there is generally a strong presumption in favor of a plaintiff's choice of forum, the United States Supreme Court has held that "a foreign plaintiff's selection of an American forum deserves less deference than an American citizen's selection of his home forum." *Reyno*, 454 U.S. at 256, 102 S.Ct. at 265-266.

13 In the instant case, the enforcement problem was mitigated substantially by the fact that the district court imposed conditions upon dismissal of the case, including (1) that Fairchild agree to satisfy any Judgment rendered by the German courts to the extent allowed by the bankruptcy plan; and (2) that Fairchild submit to the district court's retention of jurisdiction over the matter in the event that any judgments were not satisfied. (District Court Opinion at 15-16).

> To be fair, there is some evidence in the United States as well. Specifically, plaintiffs point to the fact that (1) there are nineteen present and former Fairchild employees in San Antonio who were responsible for the electrical system design, its testing and analysis, lightning testing and analysis, accident investigation, post-crash tests and post-crash remedial measures; (2) there are three Federal Aviation Administration ("FAA") personnel in Texas who certified the aircraft, investigated the crash, and issued the post-crash Airworthiness Directive; and (3) there are other experts on similar prior incidents and post-crash review of the lightning system of the aircraft who are located in Massachusetts, Ohio and Oregon. Additionally, some of the evidence that is in Germany could be made available in Texas.

(District Court Opinion at 9). In short, the trial court gave exhaustive and meticulous consideration to the private interest factors and concluded that, "on the whole, . . . the Court believes that the bulk of the evidence is in Germany and is more readily accessible there." No abuse of discretion has been demonstrated in the trial court's holding. Moreover, Fairchild's motion to dismiss, filed less than 130 days after the district court denied Plaintiffs' motion to abstain or remand, was filed in a timely manner.

Because we find that the district court did not err in holding that an appropriate alternate forum exists for Appellants' claims and that the private interest factors weigh in favor of a *forum non conveniens* dismissal, we need not reach the third step of the analysis, which involves a consideration of certain "public interest" factors.[14] *Empresa Lineas Maritimas v.*

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14 Such "public interest" factors include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies resolved at home; (3) the interest in having the trial of a diversity case in the forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *In re Air Crash Disaster*, 821 F.2d at 1162-1163, *citing Gulf Oil*, 330 U.S. at 508, 67 S.Ct. at 843.

Schichau-Unterweser, 955 F.2d 368, 376 (5th Cir.1992), *citing In re Air Crash Disaster*, 821 F.2d at 1165 (mandating consideration of public interest factors only if private interests do not favor dismissal). Nonetheless we find that the district court considered the public interest factors,[15] that it committed no abuse of discretion in reaching its conclusions, and that Appellants' complaints are without merit.[16]

In light of the foregoing, we find no clear abuse of the district court's discretion. The airline crash itself and other principal events surrounding the accident took place in Germany, the vast majority of the expected evidence and anticipated witnesses are located in Germany, and Germany is the residence of all plaintiffs and of three potential third-party defendants. While appellants correctly assert that both Germany and the State of Texas have contacts with the subject matter, we agree with the district court's determination that, "on balance, . . . Germany is the focal point of this case."

AFFIRMED.

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15 The district court considered the following public interest factors: (1) the heavy caseload of the Western District of Texas; (2) the strong interest Germany has in ensuring that its citizens are compensated for harms done to them; (3) the interest of Texas in deterring defective products; and (4) the likelihood that German law would govern the case. The court then concluded that these factors favored dismissal.

16 Specifically, Appellants argue that the district court (1) failed to consider the interests of the Western District of Texas as the locus of Fairchild's bankruptcy; (2) failed to recognize the "significant interest" on the part of Texas with respect to the liability of Texas manufacturers for products manufactured in Texas; and (3) gave undue weight to the *Reyno* and *Nolan* cases. *See Nolan v. Boeing Co.* 919 F.2d 1058 (5th Cir.1990). Appellants additionally contest the district court's determination that the law of Germany, and not that of Texas, applies to this case.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-90-CA-818
DOCKET III

FILED SEPTEMBER 30, 1991

GERTRUDE BAUMGART, ET AL.,

Plaintiffs,

—VS.—

FAIRCHILD AIRCRAFT CORP. and
SWEARINGEN AVIATION CORP.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ON GROUND OF *FORUM NON CONVENIENS*

Upon review, the Court finds that defendant Fairchild Aircraft Corporation's Motion to Dismiss on Ground of *Forum Non Conveniens* should be GRANTED.

I. *Background*

A. *Facts*

These consolidated wrongful death actions arise out of the crash of an aircraft built by defendant Fairchild Aircraft Corporation ("Fairchild"), and owned and operated by a German airline, Nurnberger Flugdienst ("NFD"). The crash occurred on February 8, 1988, near Kettwig, Germany as NFD Flight 108 was making its approach to Lohausen Airport in Dusseldorf. About seven miles short of the runway, Flight 108 was struck by lightning. The aircraft lost electrical power and

entered an uncontrolled descent for about two minutes before it came apart in the air and crashed. The two crew members and all nineteen passengers were killed when the aircraft went down.

On June 26, 1989, after finishing its investigation into the cause of the accident, the German Accident Investigation Bureau ("GAIB") issued a report in which the investigators concluded that the accident was caused by the airplane losing its entire electrical supply after the lightning strike. The report also stated that the crew flew into an area where lightning strikes could be expected although they could have flown around it, that they did not agree on a flight route in the vicinity of the thunderstorm, and that they were unprepared for the strike. Thus, both product design and crew error were listed as possible causes of the accident.

B. *Procedural History*

These wrongful death actions were originally filed in sixteen district courts in Bexar County, Texas. The claimants, all German nationals and residents, are the surviving relatives of the passengers killed in the accident. After filing for Chapter 11 protection on February 1, 1990, Fairchild timely removed the nineteen cases to the Bankruptcy Court for the Western District of Texas, relying on 28 U.S.C. § 1334(b) and 28 U.S.C. § 1452(a). On June 18, 1990, the Bankruptcy Court denied plaintiffs' Motion to Remand or Abstain. On July 30, 1990, the District Court entered an Order Adopting the Bankruptcy Court's Recommendation and Order Withdrawing Reference to Bankruptcy Court. These cases were consolidated by an Order entered on September 21, 1990.

After the Bankruptcy Court lifted the automatic stay imposed by 11 U.S.C. § 362, defendant filed this Motion to Dismiss on Ground of *Forum Non Conveniens*. When this Motion was filed, the pendency of the bankruptcy proceeding in the Bankruptcy Court complicated disposition of this matter. Since that date, however, a bankruptcy plan has been entered which limits plaintiffs' possible recovery to available insurance coverage. In light of the adoption of this plan, plaintiffs have

conceded that there no longer is any need for this Court to retain jurisdiction because of the pendency of the bankruptcy proceeding.

Accordingly, the Court will address the merits of defendant's *forum non conveniens* argument.

II. *Discussion*

The doctrine of *forum non conveniens*

> "[R]ests upon a court's inherent power to control the parties and cases before it." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1153 (5th Cir. 1987). It empowers a federal trial court to decline jurisdiction if it appears that the convenience of the parties and the court, and the interests of justice, instruct that the action be tried in another forum. *Air Crash*, 821 F.2d at 1154; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S.Ct. 252, 263, 70 L.Ed.2d 419 (1981). Th defendants bear the burden of persuasion on all elements of the *forum non conveniens* analysis. *Air Crash*, 821 F.2d at 1164.

Nolan v. Boeing Co., 762 F. Supp. 680, 682 (E.D. La. 1989), *aff'd*, 919 F.2d 1058 (5th Cir. 1990).

A. *Availability and Adequacy of Foreign Forum*

Prior to evaluating the question of whether a foreign forum would be more appropriate, the Court "must first determine that an available and adequate [alternative] forum exists." *Nolan*, 762 F. Supp. at 682.

> A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.

Air Crash Disaster, 821 F.2d at 1165.

1. *Availability of the Foreign Forum*

Defendant argues that the German courts are available as an alternate foreign forum. The Court notes that all of the plaintiffs and both crew members were German residents and nationals, and that NFD is a German corporation with its headquarters in Germany. As a result, all of the plaintiffs and the potential third-party defendants have ready access to and are within the jurisdiction of the German courts.

Further, a "defendant's submission to the jurisdiction of an alternate forum renders that forum available for purposes of *forum conveniens* analysis." *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983) (citing *Vaz Borralho v. Keydrill Co.*, 696 F.2d 379, 393 (5th Cir. 1983)). In the case at bar, while defendant is an American corporation, it has agreed to ensure that the German courts are an available forum by waiving any procedural or substantive hurdles that might otherwise prevent plaintiffs from pursuing their claims in the German courts.

Thus, the German courts are an available forum.

2. *Adequacy of the Foreign Forum*

Plaintiffs have submitted no argument that they would be treated unfairly in the German courts, or that they would receive lesser benefits there than if they were allowed to proceed in this Court. Further, there has been no suggestion that plaintiffs will be deprived of any, much less all, remedies if this case were to proceed in the German courts. In fact, defendant asserts, and plaintiffs do not contest, that German law recognizes products liability and wrongful death actions under Sections 823 and 844 of the German Civil Code. *See Rubenstein v. Piper Aircraft Corp.*, 587 F. Supp. 460, 461 (S.D. Fla. 1984).

Accordingly, an adequate and available foreign forum exists.

B. *Merits of the Forum Non Conveniens Motion*

Having found that an alternative forum exists, the Court next turns to the heart of the *forum non conveniens* motion. When

evaluating defendant's motion, the Court must always bear in mind that "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Air Crash Disaster*, F.2d at 1162 (quoting *Koster v. American Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 527, 67 S.Ct. 828, 833, 91 L.Ed. 1067 (1947)).

To guide trial court discretion, the Supreme Court has put forth a testing balancing "private interest factors" affecting the convenience of the litigants, and "public interest factors" affecting the convenience of the forum. *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1141 (5th Cir. 1989).

> The private interests to be considered are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing, witnesses; probability of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Air Crash Disaster, 821 F.2d at 1162-63 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed.2d 1055 (1947)).

"[T]he Court must also weigh in the balance the plaintiffs' choice of forum. Generally, courts should not disturb the plaintiff's choice of forum unless the balance strongly favors the defendants." *Nolan*, 762 F. Supp. at 682. "[A] foreign plaintiff's selection of an American forum [however] deserves less deference than an American citizen's selection of his home forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56, 102 S.Ct. 252, 265-66, 70 L.Ed.2d 419 (1981). This is so because deference is afforded only when "the plaintiff has chosen the home forum. When the home forum has been chosen it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." *Id.*

> The public interest factors include the administrative difficulties flowing from court congestion; the local interest

> in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Air Crash Disaster, 821 F.2d at 1162-63 (citing *Gulf Oil*, 330 U.S. at 508-09, 67 S.Ct. at 843).

In the case at bar, the Court must balance the private and public factors in order to determine whether the convenience of the parties and the ends of justice will be served by making the parties resort to the German courts.

1. *Private Interest Factors*

A review of the evidence and recent case law shows that the private interest factors weigh in favor of dismissing the case.

a. *The Nolan and Piper Aircraft Cases*

In *Nolan*, the case arose from a crash in the United Kingdom of an aircraft owned and operated by a U.K. corporation, British Midland Airways. Although the aircraft was designed, tested and manufactured in the United States, the *Nolan* district court found that virtually all of the relevant evidence was in the U.K.

> Statements of witnesses, photographs of the wreckage and crash site, air traffic control and cockpit voice recorder tapes, and information from the flight data recorder are all in the U.K. The report of the [accident investigation board] . . . and individuals who performed the investigation of the crash are there. All of the evidence regarding the operation and maintenance of the plane . . . is there. Records and witnesses regarding operational and maintenance history as well as pilot and technician training are [in the U.K.]

Nolan, 762 F. Supp. at 683.

In affirming the decision of the district court to dismiss the case, the Fifth Circuit noted that

> [T]he evidence regarding the crash itself and the actions of British Midland Airways—which is essential to the defendants' claim that pilot error caused the crash—is in the United Kingdom. The [district] court also noted that (1) [because the United Kingdom was the home of most of the represented plaintiffs] substantially all of the damages evidence is in the U.K.; (2) many of the witnesses, most of whom were in the U.K., were beyond the compulsory process of the federal courts; and (3) the defendants would be unable to join BMA as a third-party defendant in the federal forum.

Nolan, 919 F.2d at 1068-69.

The case addressed by the *Nolan* court are strikingly similar to those in the case at bar; thus, the Court would be within the bounds of its discretion were it to follow the lead of the *Nolan* court and dismiss this case.

The same is also true of the *Piper Aircraft* case, as the *Nolan* district court recognized.

> *Piper Aircraft* arose out of an air crash in Scotland. The plaintiff in that case sued the manufacturers of the airplane and propellers. Even though records of the design, manufacture, and testing of the plane and its propellers were located in the United States, the Supreme Court held that it was not unreasonable for the district court to conclude that the trial should be held in Scotland.

Nolan, 762 F. Supp. at 683.

With these two decisions in mind, the Court turns to the facts in the case at bar.

b. *The Case at Bar*

(1) Sources of Proof, Witnesses, and Ties to the Alternative Fora

The case at bar involves the crash in Germany of an aircraft owned, maintained and operated by a German company. All of the decedents and their relatives and heirs are German. On the other hand, the aircraft was designed, built and tested in Texas by a Texas corporation.

While there may be a substantial connection to Texas, most, if not all, of the evidence relating to the crash is in Germany. For instance, all of the physical evidence of the wreckage; the meteorological data; the testimony of the pilots of aircraft landing before and after the NFD flight, as well as other eyewitnesses; the photographs of the wreckage; the cockpit voice recorder tapes and information from the flight data recorder; the recorded radar and flight path data; the air traffic controllers' reports, and tapes and transcripts of their communications with the crew; and the results of tests performed by the GAIB on components and wreckage are in Germany.

Additionally, because NFD's headquarters is in Germany, all evidence about the maintenance of the aircraft, the operational history of the aircraft, and records concerning the hiring and training practices of NFD are in Germany. Moreover, all damages evidence, such as the decedents' health, life expectancies, educations, present and future earning capacities, and all of the witnesses with knowledge relating to these matters are in Germany.

To be fair, these [sic] is some evidence in the United States as well. Specifically, plaintiffs point to the fact that (1) there are nineteen present and former Fairchild employees in San Antonio who were responsible for the electrical system design, its testing and analysis, lightning testing and analysis, accident investigation, post-crash tests and post-crash remedial measures; (2) there are three Federal Aviation Administration ("FAA") personnel in Texas who certified the aircraft, investigated the crash, and issued the post-crash Airworthiness Directive; and (3) there are other experts on similar prior inci-

dents and post-crash review of the lightning system of the aircraft who are located in Massachusetts, Ohio and Oregon. Additionally, some of the evidence that is in Germany could be made available in Texas.

On the whole, however, the Court believes that the bulk of the evidence is in Germany and is more readily accessible there. Further, the evidence that is in the United States can be produced in Germany more readily than the evidence in Germany can be produced here. Moreover, while defendant disputes the value of many of the witnesses listed by plaintiffs, it has agreed to make all relevant witnesses and any documentation within its control available in Germany.

Last, but not least, the witnesses that are in Germany are beyond the reach of this Court's compulsory process. If the Court exercises its jurisdiction and retains the case, the parties will face the cost of deposing foreign witnesses, the possibility that adequate examination might not be available, and the prospect of not having live witnesses at trial.

In summary, the Court believes that as far as the connections to the alternative jurisdictions, and the relative ease of access to sources of proof and to relevant witnesses are concerned, Germany would be a more appropriate forum.

(2) *Inability of Defendants to Implead Third Party Defendants*

In addition to the factors discussed above, another consideration is the fact that this Court does not have jurisdiction over all of the relevant parties; specifically, NFD and the estate of the airplane's co-pilot.

Defendant contends that in light of the GAIB's report, crew error was a major contributing factor to the accident. If defendant can establish that the accident was caused by negligence of the crew or NFD, then there is the possibility that defendant will be relieved of some or all liability. While the Court has jurisdiction over the estate of the pilot due to the estate's filing a cause of action that is now in this Court, the Court does not and cannot acquire jurisdiction over NFD or the co-pilot's estate. Thus, defendant cannot implead either of these parties

in this action and, if plaintiffs gain a judgment, defendant would be forced to go to Germany to attempt to obtain contribution from them. The problems posed by defendant's inability to implead potential third-party defendant support dismissal of this case. *See Nolan*, 762 F. Supp. at 684 (citing *Piper Aircraft*, 454 U.S. at 259, 102 S.Ct. at 267-68).

(3) *Language Problem*

The fact that much of the evidence is in the German language would present a problem if this case were to be tried in this Court. On the other hand, if the case is prosecuted in Germany, evidence in the English language will present a problem. To help push the Court in its favor, defendant has offered to produce evidence within its control in German at its own expense. While this will alleviate the problem to a certain extent, on balance, this factor does not point strongly in one direction or the other.

(4) *Plaintiffs' Choice of Forum*

While the plaintiffs' choice of forum usually is to be given substantial deference, that is not so in this case. Here, the plaintiffs are all German nationals and residents. Thus, rather than selecting their home forum, they have selected a forum the convenience of which, from their perspective, is questionable. As a result, the Court finds that although it will respect and give weight to the plaintiffs' choice of forum, this choice does not demand the respect it might receive under other circumstances.

(5) *Enforceability of Judgment*

Finally, the Court must be aware of potential difficulties the plaintiffs might have in enforcing any judgment they might obtain. "This Court can protect plaintiffs by conditioning dismissal on defendant's agreement to satisfy any final judgment rendered by a court in" Germany. *Nolan*, 762 F. Supp. at 684. In fact, defendant has proposed such a conditional dismissal

and the Court believes that such a condition will satisfactorily address this potential problem.

On the whole, the private interest factors, particularly the ease of accessibility to sources of proof and relevant witnesses, and the inability of defendant to implead third-party defendants, weigh in favor of the Court dismissing the case.

2. *Public Interest Factors*

The Court next turns to the public interest factors and, upon review, determines that like the private interest factors, these considerations weigh in favor of dismissing the case.

Without rehashing the facts faced by the court in *Nolan*, the district court in that case found that the public interest factors weighed in favor of the U.K. forum. Specifically, the district court found that

> None of the more than 100 plaintiffs in these sixteen cases is a U.S. resident or citizen. The accident occurred in England and English law would most likely govern the resolution of these cases. Moreover, the district court noted that a trial could last for months and found that because the controversy had no connection whatsoever with the state of Louisiana, such onerous jury duty should not be imposed on the citizens of Louisiana.

Nolan, 919 F.2d at 1069.

In the case at bar, the accident occurred in German airspace, all of the decedents and plaintiffs are German, and the potential third-party defendants are German. While there are several distinctions between *Nolan* and the case at bar, the Court finds that, as they did in *Nolan*, the public interest factors argue in favor of dismissing this case.

First, while this case involves only nineteen plaintiffs and, therefore, would not take as long to try as the *Nolan* case with its 100 plaintiffs, this case still will involve a substantial amount of the Court's time. The statistics shows that the judges in the Western District of Texas carry one of the heaviest caseloads per judge of all U.S. federal judges. Administrative Office of the United States Courts, *Annual Report of the*

Director, Fed. Judicial Workload Statistics, App. I, Tbl. X-1 (1989). While similar statistics are not readily available for German courts, the situation there could not be worse.

Second, the Court recognizes that Texas has an interest in this controversy because the aircraft was designed, manufactured, and tested in Texas by a Texas corporation. On the other hand, the Supreme Court has noted that while "American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products . . . the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant." *Piper Aircraft*, 454 U.S. at 260, 102 S.Ct. at 268. In contrast, German citizens have strong interest in ensuring that its citizens are compensated for harms done to them. If, as alleged, either the pilot, co-pilot, or NFD contributed to causing this accident, the German interest in this case is that much stronger.

Finally, it is likely that German law will govern this case. In determining the law to apply, Texas has adopted the "most significant relationship test" set out in the Restatement (Second) of Conflicts of Laws § 145. *Total Oilfield Serv., Inc. v. Garcia*, 711 S.W.2d 238, 239 (Tex. 1986). Section 145 provides that the

> [C]ontacts to be taken into account . . . to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, resident, nationality, place of incorporation and places of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.

Price v. Litton Sys., Inc., 784 F.2d 600, 604 (5th Cir. 1986).

In the case at bar, Germany is the place of the injury and is the residence of all of the plaintiffs and the three potential third-party defendants. Further, Germany is site where any acts by the third-party defendants that contributed to the crash occurred. Texas, on the other hand, is the state in which the aircraft was designed, tested and manufactured. Although both jurisdictions have contacts with this case, on balance, the Court

finds that Germany is the focal point of this case and, therefore, that the German law will most likely apply.

In summary, the Court believes that like the private interest factors addressed above, the public interest factors also weigh in favor of dismissing this case.

III. *Conclusion*

Accordingly, for the foregoing reasons, the Court finds that defendant's Motion to Dismiss on Ground of *Forum Non Conveniens* should be GRANTED with the following conditions:

(1) Defendant shall submit to service of process and jurisdiction in the appropriate German forum;

(2) Plaintiffs shall file suit within 120 days of the date of the order of dismissal;

(3) Defendant shall formally waive in the German proceedings any statute of limitations defense that has matured since the commencement of these actions in Texas state court;

(4) If the German statute of limitations on the causes brought before this Court is shorter than that of the state of Texas such that the action would be barred by German law but not by Texas law, defendant shall formally waive any such defense in the German proceedings;

(5) Defendant shall make available in Germany all relevant witnesses and documents as ordered by the German courts;

(6) Defendant shall formerly agree to satisfy any final judgments rendered by the German courts to the extent allowed by the bankruptcy reorganization plan;

(7) Defendant agrees to allow this Court to resume jurisdiction over this matter if any judgments obtained against it by plaintiffs are not properly satisfied.

IT IS SO ORDERED.
SIGNED this 30th day of September, 1991.

EDWARD C. PRADO
Edward C. Prado
United States District Judge

Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

No. 92-1700

In The

Supreme Court of the United States

October Term, 1992

GERTRUDE BAUMGART, et al.,

Petitioners,

v.

FAIRCHILD AIRCRAFT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court will grant certiorari to consider Petitioners' contention that orders of the district court in this case, affirmed by the Fifth Circuit, have produced a "federal-state conflict," when this Court has no jurisdiction over the district court's order which denied Petitioners' motion to abstain or remand, and when the only challenge to the decisions below which Petitioners have preserved – their position that the district court's order dismissing Petitioners' wrongful death claims on grounds of *forum non conveniens* (even though not disputed by Petitioners on the facts) was prohibited by 28 U.S.C. § 157(b)(5) – was correctly rejected on the merits by the courts below, and, in any event, has no relevance to "federal-state" relations.

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No. 92-1700

In The

Supreme Court of the United States

October Term, 1992

GERTRUDE BAUMGART, et al.,

Petitioners,

v.

FAIRCHILD AIRCRAFT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Fairchild Aircraft Corporation, Respondent,[1] respectfully requests that this Court deny the petition for writ of certiorari of Petitioners.

OPINIONS BELOW

The opinion of the court of appeals and the district court's order of dismissal are set forth in the appendix to the petition for writ of certiorari. For completeness,

[1] Respondent has no parent company and no nonwholly owned subsidiaries.

Respondent has included, as an appendix to this brief, the unreported opinion of the bankruptcy court recommending that the motion to abstain or remand be denied (Resp. App. 1a),[2] the district court's order adopting the bankruptcy report and recommendation and denying the motion to abstain or remand (Resp. App. 40a), the judgment of the district court (Resp. App. 53a), and Petitioners' notice of appeal (Resp. App. 54a).

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1) for determining whether 28 U.S.C. § 157(b)(5) precluded the district court from dismissing this case on grounds of *forum non conveniens*. However, as set out at pp. 15 to 17 hereof, the remainder of the question presented for review by Petitioners (concerning the correctness of the district court's order overruling Petitioners' motion for abstention or remand to state court) is not within this Court's jurisdiction for two independent reasons. First, the district court's order declining to abstain or remand, was not appealed from by Petitioners. Second, a district court's order denying (or granting) abstention or remand is, in any event, not appealable. *See* 28 U.S.C. § 1334(c)(2); 28 U.S.C. § 1452(b).

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[2] Reference herein to "Resp. App. ___a" are to pages in the appendix of this brief. References to "Pet. App. ___a" are to pages in the appendix of Petitioners' petition.

PROVISIONS OF LAW INVOLVED

28 U.S.C. § 1334

Bankruptcy cases and proceedings

(c)(2) . . . Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. . . .

28 U.S.C. § 1452

Removal of claims related to bankruptcy cases

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

Texas Civil Practice and Remedies Code § 71.051

(Effective September 1, 1993)

FORUM NON CONVENIENS

(a) With respect to a claimant who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice an action to which this section applies would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the action in whole or in part on any conditions that may be just.

STATEMENT OF THE CASE

On February 8, 1988, a Fairchild metroliner III aircraft, owned and operated by a German airline, Nurenburger Flugdienst ("NFD"), crashed near Kettwig, West Germany, when the aircraft was struck by lightning during a thunderstorm. The two pilots and all nineteen passengers died in the crash.

On January 10, 1990, Petitioners, who are surviving relatives of the passengers and citizens of Germany, filed 19 separate lawsuits against Fairchild in 16 different state district courts (and before 16 different judges) of Bexar County, Texas. All such lawsuits were filed by the same law firm.

On February 1, 1990, Fairchild filed a voluntary Chapter 11 bankruptcy petition, for reasons which – as held by the bankruptcy court, the district court, and the Fifth Circuit – had nothing to do with this litigation.[3] (Resp. App. 12a; Pet. App. 3a). On February 8, 1990, Fairchild answered each of the 19 separate state court suits, denying all of Petitioners' allegations and further pleading that the suits should be dismissed under the doctrine of *forum non conveniens*.

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[3] The bankruptcy judge explained that infighting among Fairchild's competing shareholder groups led to severe lapses in management, followed by layoffs, and eventual pressure from the company's principal lender, Sanwa Business Credit. The bankruptcy was filed in consultation with Sanwa, with an understanding that the debtor would immediately seek the appointment of a Chapter 11 Trustee to take over Fairchild's affairs. (Resp. App. 12a).

On April 20, 1990, Fairchild properly removed the 19 state court suits to the United States Bankruptcy Court for the Western District of Texas. On May 3, 1990, Petitioners filed their motion to abstain or remand, to which Fairchild responded on May 15, 1990. After conducting a hearing and receiving evidence on the motion, the bankruptcy judge, in a thorough 27 page opinion, fully considered, analyzed, and rejected all of Petitioners' arguments advanced here and issued a "Report and Recommendation on Motion to Abstain or Remand," dated June 18, 1990, recommending to the district judge that Petitioners' motion to abstain or remand be denied. (Resp. App. 1a to 39a).

Thereafter, by order of July 30, 1990, the district judge, conducting a *de novo* review of Petitioners' objections, adopted the Report and Recommendation and denied Petitioners' motion to abstain or remand. (Resp. App. 40a-52a). In the same order, Fairchild's motion to withdraw the reference of the 19 cases from the bankruptcy court to the district court was granted. (Resp. App. 51a). The bankruptcy court confirmed the Trustee's Amended Plan of Reorganization on September 17, 1990. On September 21, 1990, the 19 separate suits were consolidated in the district court. On November 28, 1990, an order was entered vacating the automatic stay.

On December 5, 1990, Respondent timely moved for dismissal on grounds of *forum non conveniens*. The motion was supported with affidavits and other evidence. Petitioners filed a response and offered evidence. Respondent replied and submitted additional affidavits.

On September 30, 1991, the Honorable Edward C. Prado[4] granted Respondent's motion, dismissed the case, and ordered Petitioners to file suit in Germany within 120 days.[5] The district court carefully conditioned its dismissal by imposing six requirements upon Respondent, including requirements that Respondent satisfy any judgments rendered by the German courts to the extent allowed by the bankruptcy plan and that Respondent submit to the district court's jurisdiction if any judgments were not satisfied (Pet. App. 34a).

On January 22, 1993, the Fifth Circuit affirmed the district court and held that 28 U.S.C. § 157(b)(5) did not preclude *forum non conveniens* dismissal. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5th Cir. 1993); (Pet. App. 1a). The court of appeals also affirmed the district court's holding that Germany, and not Texas, was the most convenient forum, *id.* at 837 (Pet. App. 21a), and held that, accordingly, Petitioners' arguments as to abstention and remand had been "rendered moot". *Id.* at 834-35; (Pet. App. 16a).

Petitioners filed their petition for writ of certiorari on or about April 22, 1993, which Respondent received on April 23, 1993.

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[4] Judge Prado was assigned to this case after the previous district judge, Emilio M. Garza, was appointed to the Fifth Circuit.

[5] Respondent agreed to and the district court approved Petitioners' request to stay this 120 day time limit, first pending the outcome of the appeal to the Fifth Circuit and, now, pending this Court's determination.

REASONS FOR DENYING THE PETITION

1. SUMMARY

Petitioners seek certiorari to resolve "a conflict among the circuits" and a "federal-state conflict" alleged to have resulted from the decisions below of the bankruptcy court, the district court, and the Fifth Circuit. There are no such conflicts in this case, nor does the case present any special or important reasons that would justify the granting of certiorari.

Clearly, there is no "conflict among the circuits" concerning whether 28 U.S.C. § 157(b)(5) statutorily abolishes *forum non conveniens* in bankruptcy-related wrongful death actions, for as the Fifth Circuit correctly observed, "The question appears to be one of first impression." *Baumgart*, 981 F.2d at 829; (Pet. App. 5a).[6] The cases relied upon by Petitioners for the claim of a circuit conflict do not concern (and do not even mention) a *forum non conveniens* dismissal at all. Moreover, the Fifth Circuit's comprehensive opinion fully considered and correctly rejected Petitioners' contention that 28 U.S.C. § 157(b)(5) precluded *forum non conveniens* dismissal. Further review by this Court is simply unnecessary.

Nor have the decisions of the courts below resulted in any "federal-state conflict." There is no federal-state conflict when a federal court, as here, correctly follows and applies federal law in dismissing a case, upon which

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[6] Petitioners agreed so in the court of appeals, and in their request for oral argument said that "The issue before this Court is one of first impression." (Appellants' brief in the court of appeals p. iii).

federal question jurisdiction admittedly exists, on ground of *forum non conveniens*.

Likewise, the decision below in no way offends principles of federalism and comity. To begin with, to the extent that Petitioners complain about the district court's refusal to abstain or remand, such claim is not within the Court's jurisdiction. In any event, such order, far from being a "clear abuse of discretion," was correct – all the relevant factors were carefully and correctly analyzed in the opinions of the bankruptcy court and the district court.

Contrary to Petitioners' contention that the decisions below failed to consider Texas state interests (petition at p.11), the bankruptcy and district courts in fact did so (Pet. App. 29a, 33a; Resp. App. 23a-24a), and correctly held that the *Younger* doctrine has no application here because there are no compelling state interests implicated by resolving a claim against a bankruptcy estate within the federal system. (Resp. App. 16a). Indeed, remand would have been erroneous because no pending state proceedings remained after the 19 cases were properly removed to federal court.

Finally, the holdings of the district court and Fifth Circuit that, on balance, Germany, and not Texas, was the most convenient forum to try these cases (which ruling, on the merits, Petitioners do not contest in this Court) are not an intrusion into state court practice. Rather, they are a straightforward application of this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

2. THE FIFTH CIRCUIT'S HOLDING THAT 28 U.S.C. § 157(b)(5) DID NOT PROHIBIT FORUM NON CONVENIENS DISMISSAL WAS CORRECT.

The Fifth Circuit's unanimous holdings that 28 U.S.C. § 157(b)(5) does not abrogate the doctrine of federal *forum non conveniens* in wrongful death suits and that the district court was not precluded by such statute from dismissing this case on *forum non conveniens* were entirely correct. To begin with, federal courts have inherent discretionary power through the doctrine of federal *forum non conveniens* to decline to exercise jurisdiction when, as here, an adequate and available foreign forum is more convenient. *Baumgart*, 981 F.2d at 828; (Pet. App. 4a). The district court found that an available and adequate forum existed in Germany. As the Fifth Circuit held, Petitioners "have not challenged these findings, and we find no abuse of discretion in the trial court's holding." *Id.* at 835; (Pet. App. 18a). In fact, Petitioners do not contend, in this Court, that "there has been a clear abuse of discretion" by the district court, *Piper Aircraft Co. v. Reyno*, 454 U.S. at 257, in dismissing this case in favor of Germany. Rather, the issue, and only issue, is whether Congress, in adopting 28 U.S.C. § 157(b)(5) to remedy an expansive grant of jurisdiction to bankruptcy courts, abolished (but neglected to say so in the statute) federal *forum non conveniens* in the district courts in bankruptcy wrongful death actions.

Section 157(b)(5) is part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, enacted in response to *Northern Pipeline Construction Co. v. Marathon*

Pipe Line Co., 458 U.S. 50, 62 (1982).[7] The obvious purpose of § 157(b)(5) was to place wrongful death cases in the district court, before an Article III judge as opposed to the bankruptcy court, thus remedying the constitutional infirmity in *Marathon*. As the Fifth Circuit correctly reasoned:

> Read in the context of Section 157, where it appears, and in the context of the history giving rise to the Act and its remedial purpose, the language of § 157(b)(5) delineates jurisdiction only as between the bankruptcy courts and the district courts. In other words, non-core proceedings such as personal injury tort and wrongful death claims shall not be adjudicated in bankruptcy court, but in the Article III district court. Moreover, the district court in which the bankruptcy is pending shall have *added* power to order tried in its own venue personal injury tort and wrongful death claims filed elsewhere, or to order such cases tried in the districts where the claims arose. Once a personal injury tort or wrongful death claim is lodged in the district court where the bankruptcy is pending, however, neither the Act itself nor the legislative history of the Act evidences any intent on the part of Congress to abrogate the long-standing doctrine of *forum non conveniens* in the context of

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[7] As the bankruptcy court below correctly observed, this case, removed from state court by defendant/debtor, "is precisely the opposite of *Marathon* (where the debtor, as *plaintiff* tried to hale a third party into bankruptcy court). There is no question about the jurisdiction of this court over this case, because it involves, at bottom, nothing more than determination of the amount of the claim the plaintiffs will be entitled to assert against property of the estate." (Resp. App. 31a) (emphasis in original).

> foreign transfers. Indeed, there is no reference to the doctrine of *forum non conveniens* anywhere in the statute's legislative history.

Baumgart, 981 F.2d at 833; (Pet. App. 13a) (emphasis in original).

The Fifth Circuit's full consideration of each of Petitioners' arguments was entirely correct and need not be repeated here. Accordingly, Respondent incorporates the Fifth Circuit's opinion by reference. We would add, in particular, that Petitioners' repeated assertions that Respondent was barred from moving to dismiss on federal *forum non conveniens* after removal from state court was correctly rejected by the Fifth Circuit. As the Fifth Circuit noted, this Court, in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, upheld a district court's dismissal under *forum non conveniens* "even where the case had previously been removed to federal court and transferred to a different federal forum under § 1404(a)." *Baumgart*, 981 F.2d at 835; (Pet. App. 16a-17a).

3. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Contrary to the assertion at p. 5 of the petition for certiorari, the decision below does not conflict with decisions of the Second, Fourth and Sixth Circuits. As noted earlier (p. 7 hereof), the Fifth Circuit is the only court to have been presented with and to have decided the issue raised by Petitioners.

The decision by the Second Circuit in *In re Pan American Corp.*, 950 F.2d 839 (2d Cir. 1991) did not concern whether § 157(b)(5) abolished *forum non conveniens* in

bankruptcy related wrongful death actions. Rather, *In re Pan American* concerned a motion pursuant to 28 U.S.C. § 157(b)(5) to transfer Florida state wrongful death actions to the district court where Pan Am's bankruptcy was pending.

The Fourth Circuit's decision in *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986) is correctly analyzed by the Fifth Circuit in its opinion. *Baumgart*, 981 F.2d at 832 (Pet. App. 10a-11a). As held by the Fifth Circuit, the *Piccinin* "court never had before it a question of whether enactment of § 157(b)(5) served *sub silentio* to rescind the doctrine of *forum non conveniens*." *Id.*[8]

The Fifth Circuit also discussed the Sixth Circuit's decision in *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985), which, again, did not even mention whether § 157(b)(5) abolished *forum non conveniens*. The issue in *In re White Motor Credit* was the propriety of the district court's order that 160 separate, unliquidated and contingent products liability cases against the debtor would be left for trial in the courts where the actions were pending. The Sixth Circuit held that the district court had such authority to leave the tort cases pending in the various courts. *White Motor Credit*, 761 F.2d at 273. According to the Fifth Circuit, "Thus, in *White Motor Credit* § 157(b)(5) once again was construed to *enlarge* the district court's

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[8] Petitioners erroneously assert (petition at p. 6) that "§ 157(b)(5) overrides 28 U.S.C. § 1412, the bankruptcy *forum non conveniens* statute, which permits transfer to other district courts." Section 1412 is the bankruptcy equivalent to 28 U.S.C. § 1404(a), not *forum non conveniens*.

power to fix venue over personal injury tort cases related to the bankruptcy pending in such court." *Baumgart*, 981 F.2d at 832; (Pet. App. 12a) (emphasis in original). There is no support in *White Motor Credit* for the proposition that § 157(b)(5) curtailed the district court's power to dismiss on grounds of *forum non conveniens*.

Accordingly, there is no conflict among the circuits and no reason for the Court to accept this case.

4. THE DISTRICT COURT PROPERLY APPLIED FEDERAL *FORUM NON CONVENIENS* TO DISMISS THIS CASE

Petitioners are incorrect in contending that a "federal-state conflict" was created when the district court, in a case properly removed and over which there was unquestionable federal question jurisdiction, applied federal *forum non conveniens* to dismiss the case in favor of the more convenient German forum. Petitioners cite no authority and Respondent is unaware of any precedent which holds that federal courts, in exercising their inherent powers to dismiss cases on grounds of *forum non conveniens*, *Chambers v. NASCO, Inc.*, ___ U.S. ___, ___, 111 S.Ct. 2123, 2132 (1991), must follow state law in federal question cases. Indeed, the general rule in the federal courts is that *forum non conveniens* is a question of federal, and not state, law, even in diversity cases. *See e.g., In re Air Crash Disaster Near New Orleans, Louisiana*, 821 F.2d 1147, 1153-54 (5th Cir. 1987) (en banc) *vacated in part on other grounds, sub. nom., Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *reinstated*, 883 F.2d 17 (5th Cir. 1989).

Petitioners argue that Texas state law, as set forth in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 671 (1991) was contrary to the prevailing federal rule. The district court considered that argument but properly applied federal law. (Resp. App. 23a). In accordance with the central purpose of any *forum non conveniens* inquiry, which is to ensure that the trial is convenient, *Piper Aircraft Co. v. Reyno*, 454 U.S. at 256 (1981), the district court's order provides for the full and complete adjudication of the responsibility for this accident between all parties – plaintiffs, Fairchild, the German airline and its pilots – in the one convenient forum of Germany. (Pet. App. 30a-31a). The district court certainly did not prejudicially err in declining to follow a contrary state rule which would have necessitated two trials – one in Texas and one in Germany. *See Nolan v. Boeing Co.*, 919 F.2d 1058, 1070 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1587 (1991). Finally, we would point out that Texas has statutorily overruled *Dow Chemical Co. v. Alfaro, supra*, effective September 1, 1993. *See* Tex. Civ. Prac. & Rem. Code § 71.051(a). Thus, Texas' minority position under *Alfaro*, upon which Petitioners would predicate a "federal-state conflict", will be short lived (only three years) and henceforth Texas' stated interest is identical to federal *forum non conveniens* law and the law of at least 40 states. *See Dow Chemical Co. v. Alfaro*, 786 S.W.2d at 703 (Hecht, J. dissenting).

5. PETITIONERS' COMPLAINTS REGARDING ABSTENTION AND REMAND ARE NOT BEFORE THIS COURT, AND EVEN IF THEY WERE, THE DISTRICT COURT CERTAINLY DID NOT CLEARLY ABUSE ITS DISCRETION.

Petitioners assert at p. 4 of their petition, and devote pp. 8-12 of their petition, to the argument that "abstention and remand to the Texas state court was the sole option to trial in the district court." Of course, as just pointed out, the Fifth Circuit correctly held that 28 U.S.C. § 157(b)(5) does not deprive the district court of the "option" to apply the doctrine of *forum non conveniens* in a proper case. In any event, this Court is without jurisdiction to consider Petitioners' argument that "Abstention and remand were appropriate herein" (petition at p. 9) and such argument is without merit.[9]

The first problem with Petitioners' complaint is that the order by which the district court declined to abstain or remand has not been appealed from by Petitioners. As material here, the district court entered three separate orders: (1) "Order Adopting Bankruptcy Court's Recommendation And Order Withdrawing Reference to Bankruptcy Court," signed July 30, 1990. (Resp. App. 50a); (2) "Order Granting Defendants' Motion to Dismiss on Ground of *Forum Non Conveniens*" signed September 30, 1991 (Pet. App. 22a); and final "judgment," dismissing

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[9] Indeed, in the court of appeals, Petitioners apparently realized that appellate review was precluded. Petitioners conceded, in the court of appeals, that "appellants are not seeking review of the denial of abstention and remand by the court below." (Reply brief of appellants in the court of appeals at p. 10, n.4).

the case, signed September 30, 1991 (Resp. App. 53a). Petitioners' notice of appeal, filed October 14, 1991, is directed only to "the Order Granting Defendants' Motion to Dismiss on Grounds of Forum Non Conveniens entered in this action on September, 30, 1991"; such notice makes no mention of the July 30, 1990, order denying Petitioners' motion to abstain or remand – nor, indeed, does it mention the final "Judgment." (Resp. App. 56a). Thus, the separate order of July 30, 1990, denying Petitioners' motion to abstain or remand, is not before this Court. *Chaka v. Lane*, 894 F.2d 923, 925 (7th Cir. 1990); *May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981).

In the second place, even if Petitioners had attempted an appeal from the order denying abstention or remand, appellate review thereof nevertheless is statutorily prohibited. Petitioners moved for discretionary abstention under 28 U.S.C. § 1334(c)(1). (Resp. App. 13a). However, 28 U.S.C. § 1334(c)(2) sets forth a restriction on appellate review of orders denying (or granting) discretionary abstention under § 1334(c)(1). Section 1334(c)(2) provides in part:

> Any decision to abstain or not abstain made under *this subsection* is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1334(c)(2). (emphasis added). "There is no sentence regarding appealability in § 1334(c)(1); however, the fact that the language quoted above refers to decisions made under 'this subsection,' and not just under

'this paragraph,' leads to the conclusion that there is no right to appeal from a decision to abstain or not abstain made pursuant to section 1334(c)(1)." 1 *Collier on Bankruptcy*, § 3.01 p. 3-73 (15th ed. 1990). The Fifth Circuit has held the limitation on appellate review set forth in § 1334(c)(2) applies to discretionary abstention under § 1334(c)(1). *In re Adams*, 809 F.2d 1187, 1188 (5th Cir. 1987).

Similarly, the district court's decision not to remand is not subject to appellate review. 28 U.S.C. § 1452(b) specifically provides that such an order "is not reviewable by appeal or otherwise" by the court of appeals or this Court. The lower courts have repeatedly held that jurisdiction is lacking to review a district court's decision on remand. *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987); *In re Adams*, 809 F.2d at 1189; *Matter of Rayburn Enterprises, Inc.*, 781 F.2d 501 (5th Cir. 1986). Accordingly, that portion of the question presented for review regarding abstention and remand is simply not before this Court.

However, even if we could agree that the district court's order is reviewable, Petitioners could not establish that the district court's decision, supported by its own and the bankruptcy court's thorough opinions, represented a clear abuse of its discretion. To begin with, 28 U.S.C. § 1334(c)(1) does not *require* abstention; indeed, the statute says that "Nothing in this section prevents" a discretionary abstention. As a leading bankruptcy treatise notes, § 1334(c)(1) "is not mandatory; it merely gives the district court the discretion to abstain. . . . " 1 *Collier on Bankruptcy*, § 3.01 p. 3-72 (15th ed. 1990).

The Fifth Circuit, in *Browning v. Navarro*, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984), has set forth numerous factors to guide the exercise of the district court's discretion in deciding motions to abstain and remand. The bankruptcy court and district court carefully analyzed and adhered to these factors, including *forum non conveniens*, judicial economy, comity and respect for state court's decision-making capabilities, effect of bifurcating claims and parties and the possibility of inconsistent results, predominance of state law issues and nondebtor parties, the presence of insurance coverage, and prejudice to the parties to the action. (Resp. App. 20a-38a). The bankruptcy court received evidence and heard argument. The district court made a *de novo* review of the bankruptcy court's recommendation, reviewed the documents submitted to the bankruptcy court, and adopted the bankruptcy court's report. (Resp. App. 50a-51a). There is no occasion for this Court to review such factual and equitable determinations by two able judges.

Petitioners continue to characterize their causes of action as "state" claims. (petition at p. 9). However, the district court determined "that the law of Germany, and not that of Texas, applies to this case." *Baumgart*, 981 F.2d at 837 n. 16. (Pet. App. 21a). As held by the Fifth Circuit, Petitioners' complaints to the contrary "are without merit." *Id.* at 837 (Pet. App. 21a).

Petitioners also insist (petition at p. 12) that certiorari should be granted in this case to "discourage forum shopping." Respondent will set aside the separate issue of whether 19 different lawsuits brought by 19 German families in 16 different state courts before 16 different judges in San Antonio, Texas (and filed by the same law

firm) was any evidence of "forum shopping" by Petitioners. In any event, this argument, again, was considered and properly rejected by the court below. (Resp. App. 23a-27a, 37a). As the bankruptcy court noted, "Bankruptcy itself created the legally sufficient grounds for removal under Section 1452(a), a statute that does not contain the limitations which Section 1445 places on ordinary removal, evincing a Congressional intent that removal be more generally available (and more generously indulged) in bankruptcy cases." (Resp. App. 37a). Furthermore, Petitioners' allegation is, of course, no basis upon which to remand or abstain. When a party may "lawfully qualify" for federal jurisdiction, its "motive" in insisting upon its right to a federal tribunal is immaterial. *See Chicago v. Mills*, 204 U.S. 321, 330 (1907); *Nolan v. Boeing Co.*, 919 F.2d at 1068. Petitioners conceded that Respondent's removal "lawfully qualifies"; in the words of Petitioners' brief to the court of appeals, Respondent had "the automatic right of removal given to debtors under 28 U.S.C. § 1452." (Appellants' brief in court of appeals, p. 24).

Petitioners' reliance (at p. 12 of their petition) upon *United States v. National City Lines, Inc.*, 335 U.S. 573, 596-97 (1948) was persuasively demonstrated by the Fifth Circuit to be inapplicable to this case. *Baumgart*, 981 F.2d at 829-830; (Pet. App. 5a-7a).

Petitioners further allege that Respondent "used its bankruptcy filing to remove these cases to federal court three weeks after the *Alfaro* decision for the admitted purpose of seeking *forum non conveniens* dismissal not available in state court" (petition at p. 10) and thereby

contend that Respondent received a "windfall." Such suggestions are without merit. The uncontrovertible fact – found by the bankruptcy court, the district court and the Fifth Circuit – is that Fairchild's bankruptcy was wholly unrelated to this litigation; in other words, as found by all three courts below (see p. 4 hereof), Fairchild did not file bankruptcy in order to remove these cases to federal court. Second, Respondent has not obtained a windfall, but rightly insisted upon its prerogative to remove 19 separate lawsuits to one federal court. For the convenience of the parties, Respondent had the legal right to move, and the district court possessed the inherent power and discretion to order, that these cases be dismissed in favor of the single forum, Germany, which allows for the complete adjudication of this dispute with the presence of all parties.

Finally, Petitioners' reliance (pp. 10-11 of the petition) upon the *Younger* doctrine and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) is entirely misplaced. First of all, contrary to Petitioners' assertion, this argument was considered by the bankruptcy court below. (Resp. App. 16a). The bankruptcy court correctly reasoned that:

> The *Younger* abstention doctrine has no application to the facts of this case. *Younger v. Harris*, 401 U.S. 37 (1971). There are no compelling state interests implicated by resolving a claim against a bankruptcy estate within the federal system.

(Resp. App. 16a). We would add that, unlike the situations presented in *Younger* and in *Pennzoil*, no state court proceedings remained pending after Respondent's removal to federal court. Indeed, this Court has "never

applied the notions of comity so critical to *Younger's* 'Our Federalism' when no state proceeding was pending. . . ." *Ankenbrandt v. Richards*, ___ U.S. ___, ___, 112 S.Ct. 2206, 2216 (1992). "Absent any *pending* proceedings in state tribunals, therefore, application by the lower courts of *Younger* abstention" would be "clearly erroneous." *Id.*

CONCLUSION

This case raises no issue worthy of review by this Court. Respondent respectfully requests that the petition for writ of certiorari be denied.

May 24, 1993

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE

FAIRCHILD AIRCRAFT CORPORATION, DEBTOR	§	BANKRUPTCY CASE NO. 90-50257C
GERTRUDE BAUMGART, Individually, and as Personal Representative of the Estate of Hans-Joachim Baumgart and HANNS-SEBASTIAN BAUMGART and BABETTE BAUMGART Plaintiffs	§	CHAPTER 11
v.	§	ADV. NO. 90-5131C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

MAGRET KOELLER, Individually, and as Personal Representative of the Estate of RAINER KOELLER, Plaintiffs	§	
v.	§	ADV. NO. 90-5132C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

REGINE GRIGOLEIT, Individually, and as Personal Representative of the Estate of UDO GRIGOLEIT and as the mother and natural guardian of BIANCA GRIGOLEIT, a minor, Plaintiffs	§	ADV. NO. 90-5133C
v.	§	
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

CHRISTIANE HENNIG, Individually, and as Personal Representative of the Estate of Werner Hennig and as the mother and natural guardian of THOMAS HENNIG and THORSTEN HENNIG, minors Plaintiffs	§	
v.	§	ADV. NO. 90-5134C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

JUGE FISS, Individually and as Personal Representative of the Estate of KARL-HEINZ FISS, and as mother and natural guardian of CHRISTOPHER-DAVID FISS and ANN-CATHRIN FISS, minors, Plaintiffs	§	
v.	§	ADV. NO. 90-5135C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

BRIGITTE NABER, Individually, and as Personal Representative of the Estate of DR. GERD NABER, and as mother and natural guardian of TYLL NABER, a minor, Plaintiffs	§	
v.	§	ADV. NO. 90-5136C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

MARIE-LUISE FRICKE, Individually, and as Personal Representative of the Estate of MARTIN FRICKE, and as the mother and natural guardian of DIRK FRICKE, a minor Plaintiffs	§	
v.	§	ADV. NO. 90-5137C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

ERIKA HAFERKORN, Individually, and as Personal Representative of the Estate of Herman Haferkorn and SILKE HAFERKORN and ARNE HAFERKORN, Plaintiffs	§	
v.	§	ADV. NO. 90-5138C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

MARIE-LUISE REMMERS, Individually, and as Personal Representative of the Estate of DIETER REMMERS, and UTE REMMERS, JONS REMMERS, ELKE REMMERS, and DIRK REMMERS, Plaintiffs	§	
v.	§	ADV. NO. 90-5139C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

DOROTHIE SCHMIDT, Individually and as Personal Representative of the Estate of LOTHAR SCHMIDT, and as the mother and natural guardian of STEPHAN SCHMIDT, THOMAS SCHMIDT, and JUDITH SCHMIDT, minors, Plaintiffs	§	
v.	§	ADV. NO. 90-5140
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

URSALA SCHUBERT, Individually and as Personal Representative of the Estate of ANURCAS SCHUBERT, and as the mother and natural guardian of TANJA SCHUBERT, a minor, Plaintiffs	§	
v.	§	ADV. NO. 90-5141
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

HELGA TENNHARD, Individually and as Personal Representative of the Estate of KLAUS TENNHARD, Plaintiffs	§	
v.	§	ADV. NO. 90-5142C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

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ROGER SCHOLZ and FRITZ-BROWN SCHOLZ, Individually and as Personal Representatives of the Estate of HERBERT SCHOLZ Plaintiffs	§	
v.	§	ADV. NO. 90-5143C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

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KARIN SOTONYI, Individually and as Personal Representative of the Estate of TAMAS SOTONYI Plaintiffs	§	
v.	§	
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	ADV. NO. 90-5144C
GISELA SELLMAN, Individually and as Personal Representative of the Estate of HEINREICH SELLMAN, Plaintiff	§	
v.	§	
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	ADV. NO. 90-5145C

KATE WINTER, Individually and as Personal Representative of the Estate of HERMANN WINTER and BIRGIT WINTER and TORSTEN WINTER Plaintiffs	§	
v.	§	ADV. NO. 90-5146C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

PETER HELLMER, Individually and as Personal Representative of the Estate of JURGEN HELLMER, and JRMA HELLMER, Plaintiffs	§	
v.	§	ADV. NO. 90-5147C
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

JANICE MARIE MORRIS, Individually and as Personal Representative of the Estate of HAROLD ANTHONY MORRIS, and RICHARD PAUL MORRIS and ANDREA LORRAINE MORRIS, Plaintiffs	§	
v.	§	ADV. NO. 90-5148
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

ELSBETH ROSKE, Individually and as Personal Representative of the Estate of JOACHIM ROSKE, deceased, and AXEL ROSKE and DETLEV ROSKE, Plaintiffs	§	ADV. NO. 90-5149
v.	§	
FAIRCHILD AIRCRAFT CORPORATION, d/b/a FAIRCHILD, and SWEARINGEN AVIATION CORPORATION, d/b/a SWEARINGEN, Defendants	§	

REPORT AND RECOMMENDATION ON MOTION TO ABSTAIN OR REMAND

Came on for hearing before this Court the Plaintiffs' Motions to Abstain or to Remand and the Defendants' Response thereto in the above referenced nineteen adversary proceedings. Pursuant to Bankruptcy Rules 5011(b) and 9027(e), this court submits this its Report and Recommendation to the United States District Court with respect to the Motions. For the reasons set forth herein, this court recommends that the district court deny the motion for discretionary abstention and the motion for remand in each of the proceedings, on equitable grounds, and further recommends that the district court enter an order pursuant to 28 U.S.C. § 157(c)(5) setting these adversary proceedings on its civil docket for trial of the plaintiffs' claims.

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REPORT

I. Background

The instant adversary proceedings allege that, on February 8, 1988, Hans-Joachim Baumgart, Rainer Koeller, Udo Grigoleit, Werner Hennig, Karl-Heinz Fiss, Gerd Naber, Martin Fricke, Herman Haferkorn, Dieter Remmers, Lothar Schmidt, Anurcas Schubert, Klaus Tennhard, Herbert Scholz, Tamas Sotonyi, Heinreich Sellmann, Hermann Winter, Jurgen Hellmer, Harold Anthony Morris, and Joachim Roske, all West German nationals, were passengers aboard an aircraft designed and manufactured by the defendants and that the aircraft crashed near the town of Kettwig, West Germany, causing the decedents to suffer severe personal injuries that resulted

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in their deaths. Plaintiffs further allege that the subject aircraft was struck by lightning during flight and that, because of defects in the aircraft's electrical system, the strike rendered the aircraft uncontrollable. Plaintiffs allege that a properly designed and manufactured aircraft would have continued to operate, allowing the aircraft to complete its flight.

Based on the these allegations, the various plaintiffs filed nineteen separate lawsuits against Defendants in the sixteen different district courts of Bexar County, Texas on January 10, 1990, shortly before the expiration of the applicable statute of limitations. Each of the Plaintiffs' Original Petition and Jury Demand alleges causes of action based on strict liability, breach of warranty, negligence and gross negligence. Plaintiffs each seek wrongful death and survival damages, prejudgment interest and exemplary damages under Texas state law.

On February 1, 1990, Defendants filed a voluntary Chapter 11 bankruptcy petition, for reasons having nothing to do with this litigation.[1] The bankruptcy case is currently pending before this court. On April 20, 1990,

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[1] Swearingen Aviation is the predecessor in interest of Fairchild. Infighting among Fairchild's competing shareholder groups led to severe lapses in management, followed by layoffs, and eventual pressure from the company's principal lender, Sanwa Business Credit. The bankruptcy was filed in consultation with Sanwa, with an understanding that the debtor would immediately seek the appointment of a Chapter 11 Trustee to take over the company's affairs. A trustee was in fact appointed, with the cooperation and assistance of Sanwa, and is currently operating the company with a post-petition financing facility from Sanwa.

Defendants removed each of the state court suits to this court, initiating these adversary proceedings. On May 3, 1990, Plaintiffs filed their Motion to Abstain or Remand.

II. Motion to Abstain

Plaintiffs move for discretionary abstention under 28 U.S.C. § 1334(c)(1). Plaintiffs also seek remand of all of the cases to state court under 28 U.S.C. § 1452(b). As a general rule, abstention is inapposite in the context of a removed action in a bankruptcy case. *In re 666 Associates*, 57 Bankr. 8, 12 (Bankr. S.D.N.Y. 1985). As Judge Abram correctly observed, the mechanics of abstention

> are premised on the existence of *two* proceedings: one in bankruptcy court and a second one in the state court. Indeed if there were only one proceeding, and the court abstained with respect to it, nothing would go forward. In a removed action, there is perforce only one proceeding once removal has been made.

Id.; *but see In re Chiodo*, 88 Bankr. 780, 785 (W.D.Tex. 1988).[2]

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[2] With all due respect to my former colleague, Judge R. Glen Ayers, Jr., I must disagree with his interpretation of the interplay between Sections 1334(c) and 1452(b). The premise of Judge Ayers' decision is that there will never be an occasion to invoke abstention other than to actions removed from state court (at least in cases of mandatory abstention). *In re Chiodo*, 88 Bankr. at 785 ("this [Judge Abram's] reasoning reads subsection (c)(2) out of section 1334"). However, it is not difficult to envision a debtor initiating a compulsory counterclaim by way of an independent action brought in a bankruptcy adversary proceeding, in lieu of asserting the claim in the state court action where

Even if discretionary abstention is appropriately considered in the context of a removed action,[3] the court should consider the remand issue first. Section 1452(a) confers broad authority to centralize in a single forum the disparate litigation that typically accompanies a bankruptcy. The statute tends to further the congressional policy underlying the Bankruptcy Reform Act of 1978 that favors a single forum for the adjudication of all matters relating to the bankruptcy case, a clear departure from the fragmentation that marked the administration of cases under the former Bankruptcy Act. *See* H.Rep. No. 595, 95th Cong, 1st Sess 45 *et seq.* (1977); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 n. 40 (1982) ("[i]ndeed, we note that one of the express purposes of the [Bankruptcy Reform Act of 1978] was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes"); *A. H. Robins v. Piccinin*, 788 F.2d 994, 1014 (4th Cir. 1986) ("[n]o progress along estimating these contingent claims, however, can be made until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claims with one another may be harmonized"). The broad language of Section 1452(b), governing remand of actions removed in the context of bankruptcy, furthers this policy by permitting the district court the power to decide

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the debtor is the defendant. As the matter no doubt involves the same transaction, abstention (even mandatory abstention) could well apply, even though the removal statute had not come into play. The premise of *Chiodo* is thus faulty.

[3] Judge Abram suggests that it might be. *See In re 666 Associates*, 57 Bankr. at 12.

remand motions on any equitable grounds, and to do so without further review. 28 U.S.C. § 1452(b).[4]

Thus, if discretionary abstention is available, it should not be employed in a manner that works to undermine this important bankruptcy policy. Abstention is not a favored doctrine in the federal system in any event.

> This Court repeatedly has stated that the federal courts have a "virtually unflagging obligation" to exercise their jurisdiction except in those extraordinary circumstances " 'where the order to the parties to repair to the State court would clearly serve an important countervailing interest.' "

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[4] The prohibition on review of remand decisions is a significant adjunct to the bankruptcy removal process and indicates how important it is to that process that the trustee be afforded a single forum for the speedy adjudication of disputes.

> It is in the interests of all concerned to get to the merits of the proceeding as promptly as possible. To this end, the decision of a district court made under section 1452(b) is final when entered and cannot be attacked either at the time it is made or later. The decision may not be collaterally attacked as by mandamus or other proceedings.

1 *Collier on Bankruptcy*, ¶ 3.01[5][g], at page 3-99 (15th ed. 1989), *referring to* 1A *Moore's Federal Practice*, ¶ 0.169[2.-1] (2d ed. 1987). The policy of promoting a single forum for speedy adjudication becomes most significant when matters close to the core of bankruptcy (such as the allowance or estimation of claims) are involved. *See Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947); *Lesser v. Gray*, 236 U.S. 70, 74 (1915); *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217 (1915).

Deakins v. Monaghan, 484 U.S. 193, 108 S.Ct. 523, 530 (1988), *citing Colorado River Water Conservation District v. U. S.*, 424 U.S. 800, 813 (1976) *and Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-15 (1983). The federal court's jurisdiction has been properly invoked here. 28 U.S.C. §§ 1334(a), 1452(a); *see* 11 U.S.C. § 502 (relating to the allowance and disallowance of claims). Federal courts are not permitted to use abstention to shirk their duty, as it were, where the jurisdiction of the court has otherwise been appropriately invoked, absent the presence of clear equitable considerations warranting abstention.[5]

Section 1452(b) already directs the court to take equitable considerations into account when deciding a motion to remand. 28 U.S.C. § 1452(b) ("the court to which such claim or cause of action is removed may remand such claim or cause of action *on any equitable grounds*"). Thus, as a practical matter, the scope of review on the motion to

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[5] The *Younger* abstention doctrine has no application to the facts of this case. *Younger v. Harris*, 401 U.S. 37 (1971). There are no compelling state interests implicated by resolving a claim against a bankruptcy estate within the federal system. Even in in *Pennzoil Co. v. Texaco, Inc.*, one of the broader applications of the *Younger* doctrine, Justice Powell cautioned that

> [o]ur opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court. Rather, as in *Juidice*, we rely on the State's interest in protecting "the authority of the judicial system, so that its orders and judgments are not rendered nugatory."

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 1527 n. 12 (1987).

remand already encompasses the motion for discretionary abstention. In general, if remand is not appropriate, then neither is discretionary abstention. *In re Chiodo*, 88 Bankr. at 785; *In re Baren*, 47 Bankr. 39, 42-43 (Bankr. N.D.Ill. 1984).[6]

The court therefore recommends that the motions for discretionary abstention be controlled by the decision on the motions for remand, discussed below.

Plaintiffs did not move for mandatory abstention under 28 U.S.C. § 1334(c)(2). That subsection, by its own terms, requires the timely motion of a party for its invocation. *Id.*; *In re 666 Associates*, 57 Bankr. 8, 12 (Bankr. S.D.N.Y. 1985). As plaintiffs did not request mandatory abstention in their motion, it is now too late to urge it. Mandatory abstention also only applies to those cases which could not have been commenced in a federal court. This matter could have been, as it falls within the diversity jurisdiction of the federal courts. 28 U.S.C. § 1332(a)(2) (suits between citizens of a state and citizens of a foreign state).

This is certainly *not* to say that the considerations enumerated in Section 1334(c)(2) might not inform a court's decision to grant or deny a motion to remand, as the court may remand a case on *any* equitable ground, including grounds identical to those set out in the mandatory abstention section of Section 1334. By the same

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[6]The exercise [of] discretionary abstention, provided for in section 1334(c)(1), would essentially consist of an examination of the same equitable considerations addressed by the Court by motions to remand.
In re Baren, 47 Bankr. at 44.

token, a court may also *deny* a motion to remand *notwithstanding* the presence of the mandatory abstention elements set out in Section 1334(c)(2).

III. Motion to Remand

As noted above, the removal/remand scheme in Section 1452 is an important adjunct to the entire bankruptcy "single forum" scheme envisioned by Congress in the passage of the Bankruptcy Reform Act of 1978. H.Rep. No. 595, 95th Cong, 1st Sess 45 *et seq.* (1977); *Marathon, supra; A. H. Robins, supra.* In service to that policy, the scope of bankruptcy removal is thus considerably broader than that available for ordinary civil actions outside of bankruptcy. *Browning v. Navarro,* 743 F.2d at 1076 n. 21. Section 1452 permits the removal of any action provided (1) the matter is not a Tax Court proceeding, (2) the matter is not an enforcement action by a governmental agency exercising its police or regulatory power, and (3) the district court has jurisdiction of the claim or cause of action under Section 1334. 28 U.S.C. § 1452(a).[7]

Outside of bankruptcy, removal to federal district court is not automatically sanctioned. *Adolph Coors Co. v.*

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[7] The general removal statutes applicable to civil actions removed to federal court, by contrast, render removal subject to whatever limitations might be placed on removal by other federal laws, prohibit removal if one of the defendants is a resident of the state in which the action is brought, and exclude civil actions against railroads, their receivers or trustees, civil actions against common carriers, their receivers or trustees (if less than $10,000) and civil actions arising under state worker compensation laws. 28 U.S.C. §§ 1441, 1445.

Sickler, 608 F.Supp. 1417 (C.D.Cal. 1985); 14 Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3739 (1976). Removal petitions not involving bankruptcy are either subjected to an evidentiary hearing to determine whether the removal petition should be granted or are summarily dismissed based on the district court's review of the moving papers. 28 U.S.C. § 1446. By contrast, bankruptcy removal is automatic. The matter once removed stays in the federal system for trial, without further review or consideration by the court, unless a party specifically requests remand. 28 U.S.C. § 1452(a), (b).

A district court's decision *not* to remand a civil action removed under Section 1447 is reviewable for abuse of discretion upon the entry of a final, appealable order. The same court's decision not to remand an action removed under the bankruptcy removal statute, however, is *not* reviewable, not even for an abuse of discretion. *Browning v. Navarro*, 743 F.2d at 1076 n. 21.[8]

The differences between the two schemes clearly demonstrate the overarching policy that favors the consolidation of matters relating to a bankruptcy case in the federal system and that disfavors piecemeal disposition of bankruptcy-related matters in multiple forums. The

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[8] Review may be had of an order denying a motion to remand in the narrow circumstance in which the district court lacks subject matter jurisdiction of the entire underlying matter. *Browning v. Navarro*, 743 F.2d at 1076 n. 21. That is not the situation here, however. The subject matter of the litigation is the adjudication of claims against the estate, a matter clearly arising under the Bankruptcy Code (11 U.S.C. § 502). 28 U.S.C. § 1334(b).

bankruptcy removal statute performs the necessary function of giving the debtor's legal successor-in-interest, the trustee in bankruptcy,[9] the unquestioned power to assemble disparate litigation pending in multiple forums into the single forum furnished by Section 1334.

Remand of an action properly removed pursuant to Section 1452 must be undertaken with these policy considerations in mind. The Fifth Circuit in *Browning v. Navarro* laid out some of the equitable grounds a court might evaluate in deciding a motion to remand an action removed to a federal court in the context of a bankruptcy. They include:

> (1) forum non conveniens;
>
> (2) a holding that, if the civil action has been bifurcated by removal, the entire action should be tried in the same court;
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> (3) a holding that a state court is better able to respond to questions involving state law;
>
> (4) expertise of the particular court;
>
> (5) duplicative and uneconomic effort of judicial resources in two forums;
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> (6) prejudice to the involuntarily removed parties;
>
> (7) comity considerations; and

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[9] The chapter 11 trustee in this case was appointed approximately a month after the case was filed and was given control of and responsibility for the company and its assets. She was, of course, not involved with the company when this lawsuit was instituted. She has inherited this claim just as she inherited all of the other claims against the estate.

(8) a lessened possibility of an inconsistent result.

Browning v. Navarro, 743 F.2d 1069, 1076 n. 21 (5th Cir. 1984) (decided under the predecessor statute to Section 1452, 28 U.S.C. § 1478(b)). An analysis of these considerations, in light of the underlying intentions of Congress as discussed above, leads me to recommend that remand of these actions to state court is neither necessary, appropriate nor equitable. That analysis follows.

(1) First, there are nineteen lawsuits currently pending before sixteen different judges in Bexar County, all of which were brought by the same lawfirm. Although the plaintiffs' lawyers assure the court that they will seek consolidation of these matters before a single judge as a precondition to remand of these cases, there is no guarantee that all the current judges before whom the cases are pending will consent to such a consolidation. Furthermore, plaintiffs rely on Rule 42 of the Texas Rules of Civil Procedure as their authority for consolidation of these cases. That rule, however, sets out the procedure for maintaining a *class action* in state court. Those standards do not apply to these cases. *See* Tex.R.Civ.P., Rule 42(a).[10]

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[10] Under that rule, an action can only be maintained as a class action if it meets the prerequisites of subsection (a), which in turn specifies that the court find that "the class is so numerous that joinder of all members is impracticable." Tex.R.Civ.P., Rule 42(a). Nineteen plaintiffs is a lot of plaintiffs, but their joinder is not impracticable. One wonders why they were not joined in a single lawsuit in the first place, unless the plaintiffs sought to exploit whatever procedural advantages (or disadvantages, from the defendant's point of view) might accrue from having multiple cases before different judges. Per-

Procedural consolidation of the adversary proceedings in federal district court is, by comparison, quite simple. Rule 42(a), Fed.R.Civ.P. Consolidation reduces the likelihood of inconsistent results, reduces litigation costs, and permits the court to fashion mechanisms for streamlining discovery, pretrial and trial. *See Browning v. Navarro, supra; see also* note 6 *supra*. Because all nineteen of these cases represent similar claims against the same bankruptcy estate, the equities do not favor remand or retention.

Contrary to plaintiffs' assertions, the defendant has never had an opportunity to seek consolidation of these matters in state court. The answer date for these lawsuits fell on a date after the bankruptcy filing, at which time the statutory *automatic* stay halted the litigation. The chapter 11 trustee appointed in this bankruptcy case then elected to exercise her removal rights under Section 1452(a), bringing all nineteen of the lawsuits into a single court, foregoing the more cumbersome and less predictable consolidation process in the sixteen state courts. The trustee has thus elected what appears to her (and to this court) to have been the more efficient means for achieving consolidation of these cases, initiated by this removal application. The trustee is justified in concluding that, from her point of view, the claims adjudication process will be more streamlined before one federal judge than before sixteen state judges.[11]

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haps they hoped to increase the chances of a large award by having nineteen chances at it.

[11] This is especially true because the ultimate issue of allowance of the claims against the estate will be decided by the

(2) Second, the claim which underlies these lawsuits originates out of an aircraft crash in Germany, raising questions about *forum non conveniens*. *Browning v. Navarro, supra*. Plaintiffs have ignored this ground for remand, so clearly referenced in *Browning v. Navarro*, and have instead focused on their contention that the *forum non conveniens* doctrine was not available as a grounds for dismissal in the state forum they had originally selected.[12] They divine from the bankruptcy trustee's removal to federal court an intent to subvert or avoid this state court rule. Accusing the defendant of "forum shopping," plaintiffs conclude that the tactic should not be sanctioned by permitting the removals to stand.[13]

We must distinguish between the application of *forum non conveniens* to the case on the merits and the application of the doctrine for purposes of deciding the motions

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federal court. *See Katchen v. Landy*, 382 U.S. 323, 330 (1966); *Pepper v. Litton*, 308 U.S. 295, 304 (1939); *In re Manville Forest Products Corp.*, 896 F.2d 1384 (2d Cir. 1990), *cited in In re Chateaugay Corp.*, 111 Bankr. 67 (Bankr. S.D.N.Y. 1990).

[12] The Texas Supreme Court recently decided that *forum non conveniens* is not a valid defense or ground for dismissal of an action brought in state court. *Dow Chemical Co. v. Alfaro*, 33 Tex. Sup. Ct. J. 326 (March 28, 1990). The rule is different in federal court. *Piper Aircraft Co. v. Reyno*, 102 S.Ct. 265, 266 (1981); *see Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 504 (1946).

[13] In point of fact, removal is *typically* invoked to avoid an unfavorable forum. In fact, it is one of the more common routes by which diversity cases find their way into federal court. The underlying rationale for diversity jurisdiction was the perception that a foreign defendant might not like the local forum the local plaintiff had picked for it. The theory of diversity was that it would afford the foreign defendant an impartial forum before a federal tribunal appointed by the national government.

for remand. While related, the focus of the inquiry for remand consideration is slightly different. The proper question to ask, under *Browning v. Navarro*, is whether the state court forum is an inconvenient forum, relative to the federal forum, or vice versa. Plaintiffs complain that the federal forum is "inconvenient" because plaintiffs might be subjected to a dismissal here (on *forum non conveniens* grounds). Defendant correctly notes, however, because the state forum forces it to proceed in an inconvenient forum (i.e., Texas as opposed to West Germany) by virtue of the *Alfaro* decision (note 12, *supra*), the state forum has *itself* become an inconvenient forum for purposes of considering the remand action. On balance, the more important question to resolve, for purposes of evaluating the remand motion, is whether, as a result of the forum in which this case goes forward (state court versus federal court), one or the other party will be forced to litigate in an inconvenient forum, as demarcated by the *forum non conveniens* doctrine (i.e., Texas versus West Germany). To resolve this question, we must of necessity visit the underlying *forum non conveniens* issue.

In these cases, we note that (1) the accident occurred in West Germany, (2) the pilots were West German, (3) the airline was West German, (4) all of the plaintiffs are West German, and (5) Texas is one of the few states that entertains suits in her state courts initiated by foreign nationals.[14] As defendant correctly points out in its

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[14] Local jury awards are also fast giving our city the reputation as a great place to bring a personal injury suit, a fact certainly not lost on plaintiffs' counsel, who no doubt pursue this case on a contingency fee, giving them nearly as great an

responsive brief, the Supreme Court sanctioned the application of *forum non conveniens* dismissal to a case both factually and procedurally similar to these cases. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 265, 266 (1981). The Supreme Court there made the following telling observations, all of which apply here:

(a) Fewer evidentiary problems were posed by the trial being held where the accident occurred, even though the plaintiffs there also contended that records associated with the design and manufacture of the alleged defective part were in the United States. In the cases at hand, substantial discovery will have to take place in Germany, including depositions of each of the nineteen families, depositions of the airline crew, depositions of the airline company, depositions of air traffic controllers in Germany, and the review of significant documents located in Germany. The plaintiffs' discovery is but one side of the story. Ease of discovery from the point of view of the plaintiffs alone hardly puts an end to the issue.

(b) The defendant in *Piper Aircraft* faced greater problems with impleading third-party defendants in the United States than it would were the action initiated in the country in which the third-party defendants resided. The defendant here faces a similar problem, as it desires to bring in the West German airline, the West German flight crew, and the West German air traffic control entity.

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economic interest in the locale and ultimate outcome of the litigation as the plaintiffs themselves.

If these third-party defendants cannot be impleaded, separate actions for indemnity and contribution would have to be initiated in the foreign forum. It would be more convenient to resolve all the related claims in one trial, especially in view of the "single forum" policy considerations which predominate in bankruptcy. *See* discussion *supra*.

(c) The Court in *Piper Aircraft* found that proceeding in the foreign jurisdiction might also serve the public interest, because, for example, there might be a need to apply the law of the jurisdiction in which the accident took place. In view of the fact that the pilot, the air carrier, the plaintiffs and the situs of the accident in these cases are all West German, West German law will likely apply to the cases under choice of law authorities in both Texas and federal courts. *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979); *Harris v. Polskie Lineie Lotnicze*, 820 F.2d 1000, 1003-04 (9th Cir. 1987); *Corporacion Venegonlana de Fomenta v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied* 101 S.Ct. 863 (1981). The nation in which the accident took place also has a strong interest in the litigation because it occurred in its airspace. Here, the West German government has already issued its report indicating *its* conclusions as to fault. Finally all the decedent's survivors are residents of the foreign jurisdiction.

The facts of these cases strongly suggest that the suits should have been initiated in Germany against the air carrier and the pilots as well as the debtor in the first place. There is thus a significant likelihood that, if the *forum non conveniens* doctrine is applied to the cases on their merits, the defendant's position will be upheld, mandating that the actions be instituted in West Germany

if they are to be entertained at all. The state court forum which, under *Alfaro*, refuses to afford the defendant an opportunity to even raise this issue is thus *itself* an "inconvenient forum." On this ground, then, remand to that forum would not appear to be equitable. *Browning v. Navarro*, 743 F.2d at 1076 n. 21.

At the very least, there is no equitable reason why these actions *must* be tried in the state court when federal courts are well familiar with mass tort and multi-district litigation similar to these cases and with the application of foreign law to those sorts of proceedings. *See, e.g.*, 28 U.S.C. § 1407; *In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2d Cir.), *cert. denied*, 108 S.Ct. 695 (1987); *In re Korean Air Lines Disaster of September 1, 1983*, 575 F. Supp. 342 (Jud. Pan. Multi. Lit. 1979).[15]

(3) The third ground for recommending denial of the motion for remand is that the lawsuits directly involves property of the bankruptcy estate, over which the federal courts have exclusive jurisdiction. 28 U.S.C. § 1334(d). Circuit courts in at least five circuits, including this one, have held that insurance coverage is property of the bankruptcy estate. *See MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 109 S.Ct 176 (1988); *National Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325 (8th Cir. 1988); *Tringali v. Hathaway Mach. Co.*, 796 F.2d 553 (1st Cir. 1986); *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S.

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[15] Plaintiffs could hardly complain that West Germany is an inconvenient forum for them, as they are West German nationals.

876 (1986); *Minoco Group of Companies, Ltd. v. First State Underwriters Agency of New England Reinsurance Corp. (In re Minoco Group of Companies, Ltd.)*, 799 F.2d 517 (9th Cir. 1986); *In re Davis*, 730 F.2d 176 (5th Cir. 1984). The incident from which these lawsuits arose is not the only claim against the insurance coverage now held by the debtor. There is here the very real prospect of multiple competing claims against a single *res*, not only from these multiple plaintiffs in these nineteen separate lawsuits but also from plaintiffs in other covered incidents. These claims should be adjudicated in a single forum to maximize ratable distributions and to minimize the cost of litigation.[16] This court is the more appropriate forum to handle competing claims over property of a bankruptcy estate, over which this court has exclusive jurisdiction. *See* 28 U.S.C. § 1334(d).

The bankruptcy estate's property interests are further affected by this litigation because of the deductible and indemnity provisions of the insurance policies. The claims here in question are apparently insured through member companies of Associated Aviation Underwriters, but carries a $2 million annual aggregate deductible, covered by a letter of credit. A call on the letter of credit would further impair estate assets.[17] In addition,

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[16] The insurance company is covering the cost of defending the nineteen suits involved in these motions for remand, but that cost is (or may be) billed against the debtor's deductible. The greater the cost of defense, the greater the burden on the debtor and its creditors.

[17] The court recognizes that the letter of credit is itself not property of the estate and that the pledge against estate assets to secure that letter of credit already fully encumbers those assets

Transamerica Insurance Company evidently issued a policy for a 20% quota share, reinsured by Americas Insurance Company. The debtor was allocated a self-insured retention of this 20% quota share and agreed to indemnify Americas against liability covered by the policy, entitling Americas to a claim against Fairchild for its 20% share of $8 million of aggregate coverage in excess of the $2 million deductible up to $10 million, an additional $1.6 million of claim against Fairchild. The estate's exposure could thus reach $3.6 million. The plaintiffs' contention that the estate is not affected by this litigation because of the presence of insurance coverage is thus disingenuous.

(4) Fourth, and perhaps most significant, the federal district court has exclusive jurisdiction to hear and determine the allowance and estimation of these claims. 28 U.S.C. § 1334(a); 11 U.S.C. § 502(b), (c); *Katchen v. Landy*, 382 U.S. 323, 328-30 (1966). Even were these cases to be returned to the state court for adjudication on the merits, the state court lacks the jurisdiction to either allow or estimate the claims either for purposes of a bankruptcy plan or for distribution purposes.[18]

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to the full exposure of the letter of credit. However, if the claims are ultimately resolved in a fashion that does not call for the letter of credit to be presented and the letter is ultimately cancelled or expires by its terms, then the encumbrance on estate assets will be released, to the benefit of the estate and its other creditors.

[18] Here is how the estimation process works and what its role is in the overall reorganization of the debtor's estate. A contingent or unliquidated claim (such as this tort action) is nonetheless a claim which can be discharged in the bankruptcy, regardless whether it has been reduced to judgment before confirmation of the plan. *See* 11 U.S.C. §§ 101(4) (definition of a

An action for claims allowance or estimation lies at the very core of the administration of the bankruptcy case. It is an essential prerequisite to the most central features of bankruptcy, the classification of claims, the determination of whether a given class has accepted or rejected a plan, and the pro rata distribution of assets in satisfaction of those claims. Said the Supreme Court in *Katchen v. Landy*,

> the expressly granted power to "allow," "disallow" and "reconsider" claims which is of "basic importance in the administration of a bankruptcy estate" is to be exercised in summary proceedings and not by slower and more expensive processes of plenary suit . . . The Trustee is enjoined to examine all claims and to present his objections . . . and "when . . . objections are made, [the court] is *duty bound* to pass on them." . . . "The whole process of proof, allowance, and distribution is shortly speaking,

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claim), 1141(d)(1) (all claims, allowed or otherwise, are discharged and bound by the confirmation of a plan); *In re American Properties, Inc.*, 30 Bankr. 239, 246 (Bankr. D. Kan. 1983); *In re White Farm Equipment Co.*, 38 Bankr. 718, 724 (D. Ohio 1984). Only allowed claims are counted for purposes of voting on a plan of reorganization. 11 U.S.C. §§ 1126(a), 1129(a)(8). Section 502(c) then provides that

> (c) There shall be estimated for purposes of allowance under this section –
>
> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . .

11 U.S.C. § 502(c). In the usual case, a plan of reorganization is likely to be presented and considered long before the average pending tort litigation gets to trial, regardless of the forum.

> an adjudication of interest claimed in *res*, . . . " and thus falls within the principle quoted above that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession. . . . "objections shall be heard and determined in a summary way".

Katchen v. Landy, 382 U.S. 323, 328-30 (1966); *see also In re Manville Forest Products Corp.*, 896 F.2d 1384 (2d Cir. 1990); *In re Chateaugay Corp.*, 111 Bankr. 67, 72 (Bankr. S.D.N.Y. 1990); *In re Comstock Financial Services, Inc.*, 111 Bankr. 849, 855 (Bankr. C.D.Cal. 1990), *citing Pepper v. Litton*, 308 U.S. 295, 304 (1939); ("[t]hat bankruptcy courts have exclusive jurisdiction over the liquidation and allowance of bankruptcy claims is a principle long recognized and not reasonably disputed").[19]

The fact that a particular claim happens to arise out of a personal injury action does not alter this basic structure of claims allowance and estimation. *In re Chateaugay Corp.*, 111 Bankr. 67, 75-76 (Bankr. S.D.N.Y. March 7, 1990). Section 157(b)(2)(B) parses the allowance or estimation of claims to the district court for distribution purposes, but to the bankruptcy court for all other purposes, including the allowance and estimation of the claim. *Id.*; 28 U.S.C. § 157(b)(2)(B). Subsection (b)(5) of that statute

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[19] Lest there be any confusion, a removed case such as this, in which the debtor is the defendant, is precisely the *opposite* of *Marathon* (where the debtor, as *plaintiff* tried to hale a third party into bankruptcy court). There is no question about the jurisdiction of this court over this case, because it involves, at bottom, nothing more than a determination of the amount of the claim the plaintiffs will be entitled to assert against property of the estate.

directs that the trial of the liquidation or estimation of personal injury claims be conducted before an Article III tribunal, but only *for distribution purposes*. 28 U.S.C. § 157(b)(5); *In re Chateaugay Corp.*, 111 Bankr. at 72.

There is a clear distinction drawn in the statute between the *liquidation* of a claim and its *allowance*. Liquidation of a claim is but one step in the larger process of allowance. *In re Comstock Financial Services, Inc.*, 111 Bankr. at 856; *In re Chateaugay Corp.*, 111 Bankr. at 75-77. Once this step is completed, the balance of the allowance process is entrusted to the bankruptcy court, which determines under Section 502 whether the claim should be allowed against estate assets, under Section 510 whether the claim should be subordinated, under Section 506 the extent to which the claim should be allowed as a secured claim, under Section 507 the extent (if any) that the claim should be accorded priority status, and so forth. All of these "allowance" questions are directly related to the extent to which a claim will be permitted to share in the estate's assets, either under a confirmed plan or under a scheme of liquidation.[20]

Of particular significance is that allowance or estimation of claims *for plan purposes* – even personal injury and wrongful death claims – is part of the core responsibility

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[20] The 1984 amendments entrusted the *trial* of personal injury tort and wrong death actions to an Article III tribunal. 28 U.S.C. § 157(b)(5); *In re Poole Funeral Chapel, Inc.*, 63 Bankr. 527, 532 (Bankr. N.D.Ala. 1986). If the claim is not allowable as a matter of law, however, then even for distribution purposes no trial would be necessary and the bankruptcy court could summarily dispose of the allowance question under Section 157(b)(2)(B). *In re Chateaugay Corp.*, 111 Bankr. at 76-77.

of the bankruptcy court. "The estimation of such claims by a bankruptcy court for other purposes, such as determining the feasibility of a debtor's plan of reorganization, is permissible and constitutes a "core" proceeding." *In re Chateaugay Corp.*, 111 Bankr. at 72. The statute assigning responsibility of bankruptcy matters to the bankruptcy courts provides, *inter alia*, that

> (2) core proceedings include, but are not limited to –
>
> > (B) allowance or disallowance of claims against the estate . . . and estimation of claims or interests *for purposes of confirming a plan* under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate *for purposes of distribution* in a case under title 11.

28 U.S.C. § 157(b)(2)(B) (emphasis added). Congress intended that the bankruptcy court (or the district court, if the reference is withdrawn) estimate *for plan purposes* claims such as the one presented by this lawsuit. Noted the district court for the Southern District of New York,

> Even assuming that Section 157(b)(5) requires that all personal injury and wrongful death claims be tried in the district courts . . . Section 157 (b) (2) (B) does not exclude from the definition of core proceedings estimations of personal injury and wrongful death claims for all purposes. The section is limited to estimation "for purposes of distribution." This leaves estimation for other purposes within the jurisdiction of the bankruptcy court.

In re Johns-Manville Corp., 45 Bankr. 823, 826 (S.D.N.Y. 1984). The actual liquidation of claims for distribution purposes often follows plan confirmation and can be deferred until that time.

In this case, the likelihood is high that a plan will be proposed, voted on, considered, and ruled on well before this tort litigation is concluded, regardless of the forum. The estate is currently operating under a six-month budget funded by Sanwa Business Credit, designed to have the debtor up to full operational capacity by October 1990. At the same time, the Chapter 11 Trustee is actively pursuing potential purchasers for the company. The upshot of these two factors is that a plan of reorganization is highly likely before the end of the year, well before these cases are ready for a trial on the merits (for distribution purposes).

It is equally clear, therefore, that either this court or the district court is going to have to consider this claim in some detail *anyway* just to estimate it for plan purposes under Section 502(c).[21] Claims estimation must precede confirmation and should preferably occur before the disclosure statement is filed.[22] *See In re Aquaslide 'N' Dive*

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[21] Section 502(c) is a *mandatory* provision. Contingent and unliquidated claims must be estimated by the court for purposes of a plan, even if noone requests it, in order to go forward with the plan confirmation process itself. *In re Continental Airlines Corp.*, 64 Bankr. 865, 868 (Bankr. S.D. Tex. 1986); *In re Curtis*, 40 Bankr. 795, 801 n. 7 (Bankr. D.Utah 1984); *In re Nova Real Estate Investment Trust*, 23 Bankr. 62, 65 (Bankr. E.D.Va. 1982).

[22] The Chapter 11 Trustee will need to know how much the claims are in order to develop an appropriate responsive plan. Creditors will be entitled to know the estate's exposure to eval-

Corp., 85 Bankr. 545, 549 (9th Cir. B.A.P. 1987); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 650-51 (2d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 176 (1988) ("a bankruptcy court *must* estimate 'any contingent or unliquidated claim, the fixing of which would unduly delay the administration of the case' ") (emphasis added).

It makes little or no sense that the estimation process for plan purposes and the adjudication process for distribution purposes proceed before different courts. Hearing both the estimation and the final adjudication of these claims in the federal district court reduces the prospect of "duplicative and uneconomic effort of judicial resources in two forums." *Browning v. Navarro, supra*. It also further reduces the prospect of an inconsistent result *vis-a-vis* the estimation of the claim (which determines the relative strength of a claim for voting on the plan of reorganization) and the ultimate adjudication of the claim (which determines the actual amount of claim to be allowed against the estate's assets).

Litigation costs are also reduced significantly by uniting these dual responsibilities in a single forum. The court which ultimately presides over the liquidation of the claims will have considered the claims in a summary fashion in the claims estimation process, leading in all

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uate whether the plan eventually proposed is one that will work, that is fair to them, and is worthy of their support. Even prospective purchasers will want to know the estate's exposure before "buying into" the debtor.

likelihood to a more efficient trial on the merits and an economic use of judicial resources.[23]

Motions for remand typically call for a balancing of competing equities, and there are, of course, some factors which favor remand. These factors do not, on balance, outweigh the reasons for denying the motion to remand, however. For example, plaintiffs point out that the current caseload of the federal district courts in this district are such that the cases will not be reached for a number of years. The cases are likely to take a number of years in state court as well, however, given the kind of discovery that the parties will have to pursue (including substantial discovery in Germany).[24] What is more, the cases might be resolved solely on consideration of the defendants' motion for dismissal based on *forum non conveniens*. *See Piper Aircraft Co. v. Reyno*, 102 S.Ct. at 266. The claims estimation process will have to be heard by the federal court in any event, so the net time savings to the district court achieved by remanding trial to the state court is

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[23] Plaintiffs argue in their post-submission brief that "the only possible reason for retaining the case in federal court is to protect the estate. Statistically, Defendant's estate has only a one-in-ten chance of successfully confirming a reorganization plan." Plaintiffs' Supplemental Brief, p. 5-6. The argument is a red herring, as the success rate of reorganization cases has no legal, factual, or equitable bearing on the locus of claims litigation. The quoted statistic is misleading anyway. The success rate for *large* reorganization cases is considerably higher.

[24] The defendant will no doubt need to depose each of the plaintiffs and their families, all of whom are located in Germany. Discovery will also be needed of the German airline and its flight crew, German officials who investigated the accident, and German air traffic controllers.

illusory. The claims estimation, coupled with the plan eventually submitted, may ultimately render any actual trial unnecessary.

Plaintiffs also argued that, but for bankruptcy, these cases could not have been removed because the defendant is a resident of Texas. 28 U.S.C. § 1445(b). The lack of independent jurisdiction is, according to plaintiffs, yet another equitable reason for remanding the cases. Plaintiffs however fail to distinguish the pre-bankruptcy debtor (Fairchild) from the post-bankruptcy estate, presided over by a chapter 11 trustee. Bankruptcy itself created the legally sufficient grounds for removal under Section 1452(a), a statute that does not contain the limitations which Section 1445 places on ordinary removal, evincing a Congressional intent that removal be more generally available (and more generously indulged) in bankruptcy cases.

Finally, the plaintiffs point out that state law issues predominate. In fact, the cases are more likely to be dominated by issues of comity and choice of law involving the laws of Germany, questions of international law involving necessary parties, subject matter and *in personam* jurisdiction, arising out of the inevitable attempt to join the airline and pilot as third party defendants, and attempts at enforcing discovery orders in a foreign jurisdiction. Neither comity nor state law questions control the disposition of these motions.[25] *See Browning v. Navarro, supra.*

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[25] Plaintiffs also attempt to urge what they contend are the facts of the case as a basis for abstention or remand. These facts are at this point presumably contested. The motion at hand is not a motion for summary judgment.

As a footnote, it should be noted that the jury trial issue which so often attends such motions is not an issue here. Because Section 157(b)(5) requires the district court to adjudicate the merits of cases such as these anyway (assuming the motions to remand are denied as recommended here), the usual concerns about *de novo* review of jury findings made in related proceedings does not come up. *See* 28 U.S.C. § 157(c)(2). Furthermore, the plaintiffs will not be entitled to a jury trial on the allowance or estimation of their claims for plan purposes. *Katchen v. Landy*, 382 U.S. 323, 330 (1966); *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782 (1989); *In re Chateaugay Corp.*, 111 Bankr. at 78.

RECOMMENDATION

For all of the foregoing reasons, this court recommends that the district court enter an order denying the motions to abstain or to remand, that it withdraw the reference with regard to these claims for purposes of estimating the claims under Section 502(c), pursuant to 28 U.S.C. § 157(d), and that it docket these adversary proceedings on its civil docket for trial on the merits for distribution purposes, pursuant to 28 U.S.C. § 157(b)(5).[26]

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[26] The recommendation to withdraw the reference as to these claims for estimation purposes grows out of this court's belief that resolution of all of these related issues in a single forum is the result most consistent with this report's findings and legal analysis. This court acknowledges that the estimation of these claims for plan purposes could, under the statute, be accomplished by the bankruptcy court as well. 28 U.S.C. § 157(b)(2)(B); *In re Chateaugay Corp.*, 111 Bankr. at 75-76.

SIGNED this 18th day of June, 1990.

Leif M. Clark
LEIF M. CLARK
U.S. Bankruptcy Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:

FAIRCHILD AIRCRAFT CORPORATION	§	BANKRUPTCY CASE
DEBTOR	§	NO. 90-50257 C
GERTRUDE BAUMGART, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HANS-JOACHIM BAUMGART AND HANNS-SEBASTIAN BAUMGART AND BABETTE BAUMGART	§	
PLAINTIFFS	§	
V.	§	SA 90 CA 818
	§	ADVERSARY NO
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN,	§	90-5131 C
DEFENDANTS	§	

MAGRET KOELLER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAINER KOELLER, PLAINTIFFS	§	
V.	§	SA 90 CA 819 ADVERSARY NO. 90-5132 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

REGINE GRIGOLEIT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF UDO GRIGOLEIT AND AS THE MOTHER AND NATURAL GUARDIAN OF BIANCA GRIGOLEIT, A MINOR,	§	SA 90 CA 820 ADVERSARY NO. 90-5133 C
V.	§	
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

CHRISTIANE HENNIG, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WERNER HENNIG AND AS THE MOTHER AND NATURAL GUARDIAN OF THOMAS HENNIG AND THORSTEN HENNIG, MINORS PLAINTIFFS	§	
V.	§	SA 90 CA 821 ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5134 C

JUGE FISS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KARL-HEINZ FISS, AND AS MOTHER AND NATURAL GUARDIAN OF CHRISTOPHER-DAVID FISS AND ANN-CATHRIN FISS, MINORS, PLAINTIFFS	§	SA 90 CA 822
V.	§	ADVERSARY NO. 90-5135 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

BRIGITTE NABER,	§	
INDIVIDUALLY, AND AS	§	
PERSONAL REPRESENTATIVE	§	
OF THE ESTATE OF	§	
DR. GERD NABER, AND AS	§	
MOTHER AND GUARDIAN	§	
OF TYLL NABER, A MINOR,	§	
PLAINTIFFS	§	SA 90 CA 823
	§	ADVERSARY NO.
V.	§	90-5136 C
FAIRCHILD AIRCRAFT	§	
CORPORATION D/B/A	§	
FAIRCHILD, AND	§	
SWEARINGEN AVIATION	§	
CORPORATION,	§	
D/B/A SWEARINGEN,	§	
DEFENDANTS	§	

MARIE-LUISE FRICKE,	§	
INDIVIDUALLY, AND AS	§	
PERSONAL REPRESENTATIVE	§	
OF THE ESTATE OF MARTIN	§	
FRICKE, AND AS THE	§	
MOTHER AND NATURAL	§	
GUARDIAN OF DIRK	§	
FRICKE, A MINOR.	§	
PLAINTIFFS	§	SA 90 CA 824
	§	ADVERSARY NO.
V.	§	90-5137 C
FAIRCHILD AIRCRAFT	§	
CORPORATION D/B/A	§	
FAIRCHILD, AND	§	
SWEARINGEN AVIATION	§	
CORPORATION,	§	
D/B/A SWEARINGEN,	§	
DEFENDANTS	§	

ERIKA HAFERKORN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN AND SILKE HAFERKORN AND ARNE HAFERKORN, PLAINTIFFS	§	
V.	§	SA 90 CA 825 ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5138 C

MARIE-LUISE REMMERS, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DIETER REMMERS, AND UTE REMMERS, JONS REMMERS, ELKE REMMERS, AND DIRK REMMERS, PLAINTIFFS	§	SA 90 CA 826
V.	§	ADVERSARY NO. 90-5139 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

DOROTHIE SCHMIDT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOTHAR SCHMIDT, AND AS THE MOTHER AND NATURAL GUARDIAN OF STEPHAN SCHMIDT, THOMAS SCHMIDT, AND JUDITH SCHMIDT, MINORS, PLAINTIFFS	§	SA 90 CA 827
V.	§	ADVERSARY NO. 90-5140 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

URSALA SCHUBERT, INDIVIDUALLY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANURCAS SCHUBERT, AND AS THE MOTHER AND NATURAL GUARDIAN OF TANJA SCHUBERT, A MINOR PLAINTIFFS	§	SA 90 CA 828
V.	§	ADVERSARY NO. 90-5141 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	

HELGA TENNHARD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KLAUS TENNHARD, PLAINTIFFS	§	
V.	§	SA 90 CA 829
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	ADVERSARY NO. 90-5142 C

ROGER SCHOLZ AND FRITZ-BROWN SCHOLZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HERBERT SCHOLZ, PLAINTIFFS	§	
V.	§	SA 90 CA 830
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	ADVERSARY NO. 90-5143 C

KARIN SOTONYI, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TAMAS SOTONYI, PLAINTIFFS	§	
V.	§	SA 90 CA 831
	§	ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5144 C

GISELA SELLMAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HEINREICH SELLMAN, PLAINTIFF	§	
V.	§	SA 90 CA 832
	§	ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5145 C

KATE WINTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMANN WINTER, AND BIRGIT WINTER AND TORSTEN WINTER, PLAINTIFF	§	
V.	§	SA 90 CA 833
	§	ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5146 C

PETER HELLMER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JURGEN HELLMER, AND JRMA HELLMER, PLAINTIFFS	§	
V.	§	SA 90 CA 834
	§	ADVERSARY NO.
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN, DEFENDANTS	§	90-5147 C

JANICE MARIE MORRIS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD ANTHONY MORRIS AND RICHARD PAUL MORRIS AND ANDREA LORRAINE MORRIS,	§	
PLAINTIFFS	§	SA 90 CA 835
V.	§	ADVERSARY NO. 90-5148 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN,	§	
DEFENDANTS	§	

ELSBETH ROSKE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOACHIM ROSKE DECEASED, AND AXEL ROSKE AND DETLEV ROSKE,	§	
PLAINTIFFS	§	SA 90 CA 836
V.	§	ADVERSARY NO. 90-5149 C
FAIRCHILD AIRCRAFT CORPORATION D/B/A FAIRCHILD, AND SWEARINGEN AVIATION CORPORATION, D/B/A SWEARINGEN,	§	
DEFENDANTS	§	

ORDER ADOPTING BANKRUPTCY COURT'S RECOMMENDATION AND ORDER WITHDRAWING REFERENCE TO BANKRUPTCY COURT

On this date came on to be considered the United States Bankruptcy Court's Report and Recommendation filed June 18, 1990, and Plaintiff's Objections thereto filed July 2, 1990, The Court has conducted a *de novo* review of those matters objected to by Petitioner as required by 11 U.S.C. § 9033 (d) and has determined that the Bankruptcy Court's recommendation that the Plaintiff's Motion to Abstain or Remand be denied is proper. The Court shall therefore accept the Bankruptcy Court's recommendation to deny the Plaintiff's Motion to Abstain or Remand. The Court will also grant the Defendant's Motion to Withdraw the Reference.

Plaintiff's Motion to Abstain or Remand

In deciding whether to abstain or remand this state court action previously removed to the Bankruptcy Court, this Court must weigh such considerations as: forum non conveniens; judicial economy; comity and respect for state court's decision-making capabilities; effect of remand upon administration of bankruptcy estate; effect of bifurcating claims and parties and the possibility of inconsistent results; predominance of state law issues and nondebtor parties; and prejudice to parties to the action. 28 U.S.C. §§ 1334 (c)(1) and 1452 (b); *Western Helicopters, Inc., v. Hiller Aviation, Inc.*, 97 B.R. 1, 3 (1988); *Browning v. Navarro*, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984). The Court has considered these issues as addressed in the Bankruptcy Court's Report and Recommendation and Petitioner's objections thereto. The Court

has reviewed all documents submitted to the Bankruptcy Court regarding these motions.

Each of Plaintiffs objections to the Report and Recommendation merely reurge the same arguments that were already before the Bankruptcy Court. The Report and Recommendation adequately addressed each issue objected to by Plaintiffs. This Court has made a de novo review of all matters regarding these motions and finds no error in the Bankruptcy Courts' recommendation to deny the Motion to Abstain or Remand.

Defendant's Motion for Order on Withdrawal of the Reference

In accordance with 28 U.S.C. § 157(b)(5) this Court shall order that the wrongful death claims shall be tried in the district court for the district in which the bankruptcy case is pending and pursuant to 28 U.S.C. § 157(d) this Court shall withdraw reference of these adversary proceedings from the bankruptcy court.

Consolidation

Furthermore, pursuant to Fed. R. Civ. P. 42, this Court shall order that all the above referenced actions be consolidated upon transfer to this Court.

The Bankruptcy Court's Report and Recommendation are ADOPTED.

Plaintiff's Motion to Abstain or Remand is DENIED.

Defendant's Motion for Order on Withdrawal of Reference is GRANTED.

The nineteen above referenced actions shall be CONSOLIDATED upon transfer to this Court.

IT IS SO ORDERED.

Signed this 30 day of July, 1990.

Emilio M. Garza
EMILIO M. GARZA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GERTRUDE BAUMGART, ET AL.,	§	
Plaintiffs	§	CIVIL ACTION
	§	NO. SA-90-
V.	§	CA-818
FAIRCHILD AIRCRAFT CORPORATION and SWEARINGEN AVIATION CORP.,	§	
Defendants	§	

JUDGMENT

In accordance with the Court's Order of Dismissal, it is hereby ORDERED, ADJUDGED AND DECREED that this case is DISMISSED and that the parties should bear their own attorney's fees and costs.

IT IS SO ORDERED.

SIGNED this 30th day of Sept, 1991.

Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GERTRUDE BAUMGART, ET AL.,	§	
Plaintiffs	§	CIVIL ACTION
	§	NO. SA-90-
V.	§	CA-818
FAIRCHILD AIRCRAFT CORPORATION and SWEARINGEN AVIATION CORP.,	§	
Defendants	§	

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, GERTRUDE BAUMGART, individually, and as personal representative of the estate of Hans-Joachim Baumgart, and HANNS-SEBASTIAN BAUMGART and BABETTE BAUMGART; CHRISTIANE HENNIG, individually, and as personal representative of the estate of Werner Hennig, and as the mother and natural guardian of THOMAS HENNIG and THORSTEN HENNIG, minors; URSULA SCHUBERT, individually, and as personal representative of the estate of Anurcas Schubert, and as the natural guardian of TANJA SCHUBERT, a minor; HELGA TENNHARD, individually, and as personal representative of the Estate of Klaus Tennhard; GISELA SELLMANN, individually, and as personal representative of the estate of Heinreich Sellmann; KARIN SOTONYI, individually, and as personal representative of the estate of Tamas Sotonyi; MARIE-

LUISE FRICKE, individually, and as personal representative of the estate of Martin Fricke, and as the mother and natural guardian of DIRK FRICKE, a minor; REGINE GRIGOLEIT, individually, and as personal representative of the estate of Udo Grigoleit, and as the mother and natural guardian of BIANCA GRIGOLEIT, a minor; ELSBETH ROSKE, individually, and as personal representative of the estate of Joachim Roske, deceased, and AXEL ROSKE and DETLEV ROSKE; ERIKA HAFERKORN, individually, and as personal representative of the estate of Herman Haferkorn, and SILKE HAFERKORN and ARNE HAFERKORN; ROGER SCHOLZ and FRITZ-BROWN SCHOLZ, individually, and as personal representative of the estate of Herbert Scholz; KATE WINTER, individually, and as personal representative of the estate of Hermann Winter, and BIRGIT WINTER and TORSTEN WINTER; JANICE MARIE MORRIS, individually, and as personal representative of the estate of Harold Anthony Morris, and RICHARD PAUL MORRIS and ANDREA LORRAINE MORRIS; MARIE-LUISE REMMERS, individually, and as personal representative of the estate of Dieter Remmers, and UTE REMMERS, JONS REMMERS, ELKE REMMERS and DIRK REMMERS; BRIGITTE NABER, individually, as personal representative of the estate of Dr. Gerd Naber, and as the mother and natural guardian of TYLL NABER, a minor; DOROTHIE SCHMIDT, individually, and as personal representative of the estate of Lothar Schmidt, and as the mother and natural guardian of STEPHAN SCHMIDT, THOMAS SCHMIDT and JUDITH SCHMIDT, minors; JUGE FISS, individually, and as personal representative of the estate

of Karl-Heinz Fiss, and as the mother and natural guardian of CHRISTOPHER-DAVID FISS and ANN-CATHRIN FISS, minors; PETER HELLMER, individually, ad [sic] as personal representative of the estate of Jurgen Hellmer, and JRMA HELLMER; and MAGRET KOELLER, individually, and as personal representative of the estate of Rainer Koeller, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the Order Granting Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens* entered in this action on September 30, 1991.

Dated: New York, New York
October 14, 1991

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

Signature below certifies that a true and correct copy of the foregoing was sent on the 14th day of Oct, 1991, by certified mail, return receipt requested, on the following:

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Supreme Court, U.S.
FILED
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(3)

No. 92-1700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GERTRUDE BAUMGART, et al.,

Petitioners,

—v.—

FAIRCHILD AIRCRAFT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1700

GERTRUDE BAUMGART, et. al.,

Petitioners,

—v.—

FAIRCHILD AIRCRAFT CORPORATION,

Respondent.

PETITIONER'S BRIEF IN REPLY

Petitioners Gertrude Baumgart, et al., respectfully submit this reply brief.

Respondent's brief in opposition mischaracterizes and fails to address the central issue which merits this Court's review, namely, whether federal bankruptcy provisions grant the district court only two options for removed bankruptcy-related death actions: trial in federal district court under 28 U.S.C. § 157(b)(5) or abstention with remand to preserve federal-state comity under 28 U.S.C. §§ 1334(c)(1) and 1452(b).

The *forum non conveniens* dismissal below violated the jurisdictional scheme established by these bankruptcy statutes.

To achieve the primary goal of a single federal bankruptcy forum, Congress provided for automatic removal of all bankruptcy-related actions, 28 U.S.C. § 1452(a), and expressly mandated trial of bankruptcy-related death and injury actions in the district court where the bankruptcy is pending or where

the claim arose under 28 U.S.C. § 157(b)(5). *In re Arnold Print Works, Inc.*, 815 F.2d 165, 167 (1st Cir. 1987); *A.H. Robins v. Piccinin*, 788 F.2d 994, 1101 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986).

Competing with this "single forum" goal was a serious Congressional concern for "comity between Federal and State courts", 130 Cong. Rec. S7157 (June 19, 1984) (Sen. Dole), which prompted Congress to temper the broad bankruptcy jurisdiction with statutory abstention and remand under 28 U.S.C. §§ 1334(c)(1) and 1452(b). Under this Congressional compromise, abstention or trial in federal court are the only options. 130 Cong. Rec. S8890 (June 29, 1984) (Sen. Dole).

Fairchild attempts to avoid the mandatory language of 28 U.S.C. § 157(b)(5) by arguing that the statute does not expressly abrogate *forum non conveniens*. But, Fairchild ignores that *forum non conveniens* dismissal is inherently repugnant to Fairchild's invocation of federal jurisdiction based on its own bankruptcy filing. There was no need for Congress expressly to consider *forum non conveniens*, because jurisdiction over bankruptcy-related state death and injury actions exists at the request of and for the sake of the *debtor* to provide a single forum for the protection of its estate.

In *United States v. National City Lines, Inc.*, 334 U.S. 573, 596-97 (1948), this Court held that *forum non conveniens* was inapplicable in antitrust cases, despite the fact that the relevant venue statute did not expressly bar *forum non conveniens* dismissal. This Court found that the grant of federal jurisdiction to hear certain cases can preclude application of the *forum non conveniens* doctrine. *Id.* Such is the case here.

Contrary to Fairchild's claims, a clear conflict exists between the decision below and *In re Pan American Corp.*, 950 F.2d 839 (2d Cir. 1991), *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985) and *Piccinin*, 788 F.2d 994. These cases defined the power of the federal court seized of a bankruptcy proceeding to determine the proper forum to adjudicate

bankruptcy-related death and injury actions. The Second, Fourth and Sixth Circuits plainly held that Section 157(b)(5) mandates federal district court adjudication of such bankruptcy-related death and injury actions, with one statutory exception, abstention under Section 1334. *In re White Motor Credit*, 761 F.2d at 273, *In re Pan American Corp.*, 950 F.2d at 844; *Piccinin*, 788 F.2d at 1010-11.

Fairchild mischaracterizes Petitioners' argument when it claims Petitioners seek appellate review of the district court's July 1990 order, which denied abstention and remand, and pursuant to 28 U.S.C. § 157(b)(5) ordered "that the wrongful death claims shall be tried in the district court for the district in which the bankruptcy case is pending. . . ." *See* Respondent's App. 51a. This decision conformed with the Court's statutory options: (1) abstention and remand under Section 1334 and Section 1452 or (2) trial in federal court under Section 157(b)(5).[1]

Petitioners' appeal is from the later order (entered by a different district court judge) which granted *forum non conveniens* dismissal *without ever having addressed* Petitioners' legal argument that the bankruptcy statutes prohibit such dismissal and only permit trial in federal court or abstention and remand to state court.

This Court has jurisdiction over this appeal concerning the proper construction of the bankruptcy statutes and the principles of federalism and comity incorporated therein.

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1 Fairchild errs in suggesting to this Court that there is unanimous agreement that no appeal ever lies from a decision not to abstain under Section 1334(c)(1). The circuits are in disagreement on this. *See e.g., In re Pan American Corp.*, 950 F.2d at 843-844 (allowing appeal); *In re Eastport Associates*, 935 F.2d 1071, 1075 (9th Cir. 1991) (allowing appeal); *In re Ben Cooper, Inc.*, 924 F.2d 36, 38 (2d Cir. 1991) (allowing appeal); *Matter of Howe*, 913 F.2d 1138, 1143 (5th Cir. 1990) (allowing appeal); *but see, In re Adams*, 809 F.2d 1187, 1188 (5th Cir. 1987) (disallowing appeal).

Fairchild claims, inappositely, that no federal-state conflict exists in that the federal courts may apply federal law to a *forum non conveniens* dismissal motion. But, Petitioners claim that a federal-state conflict exists because the *forum non conveniens* dismissal below was inconsistent with the exercise of federal bankruptcy jurisdiction over a removed state death action. If bankruptcy jurisdiction is no longer needed because defendant's status as a debtor has been resolved, the very nature of the court's jurisdiction, which exists solely due to the defendant's status as a debtor, requires that it abstain and remand in deference to the state court.

Finally, Fairchild errs in stating that abstention with remand is unavailable in a removed bankruptcy-related state death action. Fairchild ignores that this case does not involve *Younger* abstention, but rather express statutory abstention designed to advance federal-state comity.[2] Under the bankruptcy laws, remand and abstention work together. The removal statute, 28 U.S.C. § 1452, expressly incorporates 28 U.S.C. § 1334, the bankruptcy jurisdiction and abstention statute, demonstrating the necessary interrelationship of the two. *See e.g., In re Adams*, 809 F.2d 1187 (5th Cir. 1987) (involving abstention in a removed state case with remand to state court).

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), this Court explained the relationship between abstention and remand. The Court held that a district court which relinquishes federal jurisdiction over a removed case has the inherent power and discretion to remand the case to state court. *Id.* at 351. Here that power was established by statute and is the only exception to the mandatory requirement of Section

2 Fairchild cites *Akenbrandt v. Richards*, 112 S.Ct. 2206, 2216 (1992). But *Ankenbrandt* is not a statutory abstention case and Fairchild omits relevant language from the referenced quote. This Court stated: "we have never applied the notions of comity so critical to Younger's "Our Federalism" when no state proceeding was pending nor any assertion of important state interests made."

157(b)(5) of trial in federal court. When the district court below relinquished bankruptcy jurisdiction over these removed state claims, its only recourse was to abstain and remand to Texas State Court.

CONCLUSION

For the reasons stated in Petitioners' Brief and in this Reply, it is respectfully requested that certiorari be granted to review the decision below.

Dated: June 4, 1993

Respectfully submitted,

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